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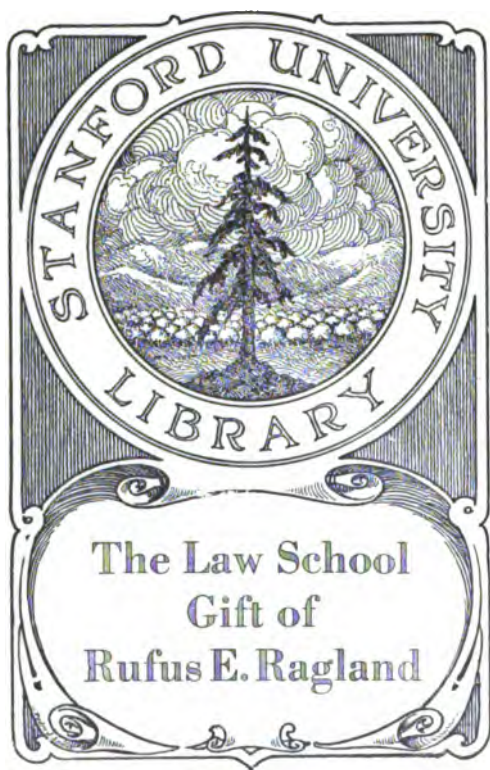
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**COURTS OF EQUITY AND COMMON LAW;**

**AND IN THE**

**Admiralty and Ecclesiastical Courts;**

**INCLUDING ALSO**

**CASES IN BANKRUPTCY AND CROWN CASES RESERVED.**

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**EDITED BY**

**EDMUND H. BENNETT AND CHAUNCEY SMITH,**

**COUNSELLORS AT LAW.**

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**VOLUME XIII.**

**Containing Cases in all the Courts of Equity, during the year 1852.**

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Some cases in the 10 Common Bench Reports, were *apparently* decided in Michaelmas Term, 1850, which are not found in the Law and Eq. Reports. Such are, *Doe d. Prior v. Ongley*, p. 102, *Spartaki v. Benecke*, p. 212, and others.

All these cases were, in fact, decided at an earlier date, and were received by us more than two years since, but, on account of the time of their decision, were not inserted in our series. It would be inconsistent with the plan and present progress of our publication, to insert any such old cases now. Michaelmas Term is the beginning of a *legal* year; and our subscribers may rely with entire confidence upon receiving, in the Law and Equity Reports, *every* reported decision since that period, which is contained in any English series of Reports, of which we have about twenty.

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A

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# CASES

ARGUED AND DETERMINED

IN THE

## COURTS OF CHANCERY;

DURING THE YEAR 1852.

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THE GRAND TRUNK STAFFORD AND PETERBOROUGH RAILWAY COMPANY (Official Manager of), *v.* BRODIE & others.<sup>1</sup>

January 13, 15, 22, 27 and 28, 1852.

*Pleading — Bill by one on behalf of several — Official Manager, Costs of — Fraud.*

The bill was filed in December, 1846, by W., a subscriber to an abortive Railway Company, (which never had complied with the Standing Orders,) on behalf of himself and all other scripholders and shareholders except the defendants, against the defendants, (the promoters, directors, and secretary,) alleging, among other frauds, a fraudulent issue of spurious shares, upon which no deposit had been paid, but in respect of which a repayment of a pretended deposit was made; and praying among other things, that all such fraudulent payments might be made good by those charged with the fraud. W. was a subscriber for forty shares, had paid 2*l.* 2*s.* per share deposit, and had placed his scrip shares in the hands of the secretary (a defendant to the bill) as a security for advances made by the secretary to him. In May, 1846, it was resolved to wind up; half the deposit of 2*l.* 2*s.* was repaid, and thereupon the original scrip certificates were delivered up to be cancelled, and new certificates issued; and subsequently a further return of 2*s.* 2*d.* per share was made to the scripholders, on which occasion these new certificates were called in, and the scripholders signed a memorandum engaging to release the promoters. Afterwards, however, the bill was filed, and in the course of the suit an official manager was appointed. In July, 1849, an order was obtained for the official manager to carry on the suit in the place of W.:—

*Held*, first, that W. could not have maintained a suit if he had still continued the nominal plaintiff.

Secondly, that the official manager was not in a better position to maintain the suit than W.,

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the original plaintiff; in adopting the suit, the official manager took it with all its infirmities. And,

Thirdly, that the suit being improperly constituted in its inception, and the evidence not justifying the institution of the suit on the merits, the bill ought to be dismissed, with costs, to be paid by the official manager, without prejudice to the question how far he was entitled to have those costs made good to him out of the assets of the company; and bill dismissed accordingly, with costs to be paid by the official manager.

The statement of the facts in this case fully appears in the judgment.

*The Solicitor-General, (Sir W. P. Wood), Stuart, Rolt, J. Baily, J. Nicholl, Selwyn, Collier, Roxburgh, W. Morris, Stevens, Rogers, Osborne, and Welford* appeared for the different parties.

TURNER, V. C. The bill in this case was originally filed by Mr. Warren, on behalf of himself and all other scripholders and shareholders, against the defendants, who were several of them provisional directors, and one of them had been secretary to the company, which had been projected in 1845. 2l. 2s. had been paid as a deposit by each subscriber. Mr. Warren, the plaintiff, had subscribed for forty shares, and had paid his deposit upon them. The company, which had been provisionally registered, failed to obtain an act of parliament, in consequence of being too late in complying with the standing orders of the house. Under these circumstances, a meeting of the company was called in the month of May, 1846, and it was resolved not to prosecute the scheme. It was at the same time also resolved that the sum of 1l. 1s. per share should be repaid to each subscriber as the first dividend or instalment, and afterwards a further dividend of 2s. 6d. per share. These were paid through the defendant Harman, the secretary, by checks on the company's bankers, signed by some of the provisional directors. The bill alleged that a dividend of 1l. 1s. had been paid upon each of the 1,490 shares which had been fraudulently issued, and on which the deposit of 2l. 2s. had never been paid. The bill prayed that the defendant Harman might be decreed to repay, with interest at 5l. per cent, the sum of 1,564l. 10s. alleged to have been received by him out of the funds of the company by means of twenty-four bankers' checks, given in respect of the alleged spurious scrip certificates, and 235l. received or retained by him in respect of dividends upon 200 shares belonging to the company; that he might be decreed to repay all other moneys belonging to the company, and retained by him for his own use, which had been received by him, and for which he was accountable; that proper accounts might be taken for the purpose of ascertaining what was due from the defendant Harman to the company; that it might be declared that the several payments in respect of such alleged spurious scrip certificates were breaches of trust on the part of such of the defendants as had signed the checks, and that they might be ordered to make good all losses upon the same; that the directors might be directed to refund with interest all moneys of the company retained or applied by them to their own use, by way of remunera-

tion for their services, or for purposes not authorized by the subscribers' agreement. In December, 1846, the bill was filed, and after several of the defendants had put in their answers, an order for winding up the affairs of the company was obtained. An official manager was appointed, and on the 31st July, 1849, an order was made in the cause, and in the matter of this company, that the suit should be prosecuted by the official manager as the nominal plaintiff.

Two questions, not involving the merits of the case, were much discussed at the hearing of the case, namely, first, whether the original plaintiff, Warren, could have maintained the suit; and, secondly, what was the effect of the order for substituting the official manager as plaintiff. As to the competency of Warren to maintain the suit, it appeared by the bill that about the latter end of 1845 he had deposited the scrip certificates for his forty shares with the defendant Harman for securing a sum of money; that on the dividend of 1*l.* 1*s.* per share being repaid, the original scrip certificates were called in, and new certificates were issued; and that on the payment of the further dividend of 2*s.* 6*d.* per share, these new certificates were called in, and the parties who brought them signed a memorandum, undertaking to execute a release to the directors when called upon to do so. It was stated that the defendant Harman had signed this memorandum. It appeared, therefore, that both on the original and on the new certificates being delivered up, new contracts were entered into by the parties.

These contracts the bill did not seek to disturb, but it went on the footing of the original partnership, as if the scripholders and shareholders who had entered into these new contracts were entitled to recover beyond the amounts and conditions stipulated under these contracts; and the first question, therefore, to be considered was, whether the plaintiff, suing on behalf of himself and the other scripholders and shareholders, could have maintained any such right. It may, I think, on the evidence, be assumed that the defendant Harman is to be considered merely as the agent of the plaintiff, Warren, in delivering up the certificates, and that both were ignorant of the alleged frauds, but some of the other defendants were cognizant of and participators in such alleged frauds. Upon this assumption it can hardly be denied that the original plaintiff and his mortgagee would be entitled to undo the contracts which were entered into in the manner I have mentioned on the occasion of the new and original certificates being delivered up. Nor would they have been held bound by the undertaking to release the directors. But does it follow that they can undo the contracts, and at the same time retain the moneys received under those contracts? I think not; and if the contracts are to be undone at all, they must be undone in toto. What then, would be the position of the original plaintiff, Warren, as between himself and his mortgagee, and as between himself and the other shareholders? As between himself and his mortgagee, there would have been an obligation on him to bring back at least the instalment paid on each share; and the difficulty might have been surmounted by making the relief conditional on his doing so. But how would it have been



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as between the plaintiff and the other shareholders, whom he had assumed to represent? How could the plaintiff compel the other shareholders to refund the sums which they had received? Each of them might at least have a right to elect whether he would abide by the transaction, retaining the moneys, or impeach the transaction and refund the moneys. What right would the original plaintiff, Warren, have had to make this election for them? If, therefore, the bill rest solely on the right of the original plaintiff to sue, it cannot be sustained. Several other points affecting the same result were brought forward in argument on the part of the defendants, and some of them were not less unfavorable to the right of the plaintiff to sue on behalf of himself and the other scripholders and subscribers. Some of the objections, indeed, were scarcely attempted to be answered on the part of the plaintiff. The conclusion to which I have arrived on this part of the case, therefore, without reference to the question of the merits, is, that this bill could not be sustained by the original plaintiff, Warren.

It remains to be considered what is the effect of the order for the prosecution of the suit by the official manager. This order depends on the construction of the stat. 11 & 12 Vict. c. 45, s. 53, which enacts, that where any action, suit, or other proceeding shall have been brought or instituted, or shall be pending, by or on behalf of the company in respect of which the official manager shall have been appointed, or by any person duly authorized to sue as the nominal plaintiff on behalf of such company, or by any one or more members or contributories of such company on behalf of himself and the other members or contributories thereof, it shall be lawful for such plaintiff to substitute the official manager as the plaintiff in such action, suit, or other proceeding, by entering a suggestion on the roll to that effect in an action, and by obtaining an order to that effect in such suit, such order to be obtained on motion or petition, without notice; and that it shall be lawful for the official manager thenceforward to prosecute such suit or other proceeding, in the same manner and with the same effect, to all intents and purposes, as if such suit or proceeding had been commenced by the official manager as plaintiff, under the provisions of the act.

It has been insisted, on the part of the defendants, that the case did not at all fall within the provisions of the section in question. But I think that it would be difficult to answer some of the arguments which have been urged on that point, particularly as to the character of the suit, which was instituted on behalf of the scripholders and shareholders, and not on behalf of all, but of all except the defendants. I do not, however, think it necessary to give any opinion upon the question, whether the case falls within the provisions of the section, because what the official manager has to make out to entitle him to maintain the suit is, that he has a better right than the original plaintiff. I am of opinion that the official manager had no better right when he became plaintiff than the original plaintiff had; but the moment he took the suit upon himself, he adopted it, with all the infirmities attached to it, and by these he must abide.

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According to the provisions of the section, he was thenceforward to prosecute the suit in the same manner, and with the same effect, as if it had been commenced by him as plaintiff under the act. What he is to prosecute is the original suit, and by that, or by any amendment of it, he must, in my opinion, abide. To construe the words of the section, "as if the suit had been commenced by him," as freeing the suit from objections to which it would have been open if carried on by the original plaintiff, would lead to the most palpable injustice. If that is to be the construction put upon these words, the defendants might find themselves called upon, at the hearing of the cause, to encounter equities which they would have had no opportunity of meeting. It would, in my opinion, require the strongest proof of such an intention on the part of the legislature to warrant the Court in adopting this construction, as contended for by the official manager. I find nothing in the act which at all points to the conclusion that the legislature had any such intention. Independently of the merits of the case, therefore, I am of opinion that the frame of the pleadings is such, that the bill must be dismissed; but as the merits of the case very materially affect the characters of the parties, and are proper to be taken into consideration on the question of costs, I have felt it to be my duty to look into them.

The case made by the bill is, that the company's certificates were, in the first instance, printed in blank, as to the numbers, and as to the names of the two directors by whom they were to be signed; that these certificates were bound up in books, with counterfoils to the certificates, each book containing certificates to the amount of several thousands of pounds; that as they were thus bound up the directors signed their names to the certificates, and put their initials to the counterfoils, and then handed back the books to the secretary for the purpose of countersigning the certificates when issued; that the company had also a share register-book, in which were entered the names of parties who had signed the agreement, and the number of shares which had been issued to each subscriber; that as the signature of the certificates occupied a considerable time, the directors occasionally took the scrip-books home with them for the purpose of signing the certificates, and returning them to the secretary to fill up and sign as they were wanted; that since the time when the defendant Harman became secretary, the scrip-book, No. 39, was in the hands of the defendant Brodie, for the purpose of signing the scrip certificates, which had already been signed by Harrison, or some other provisional director; that it contained certificates for 2,000 shares, none of which had ever been issued; that it was suffered to remain in Mr. Brodie's possession, and was never returned to the office of the company; that the plaintiff, Warren, had lately discovered that the defendants Brodie and Harman had entered into some secret arrangement, by which they might make use for their own benefit, and in fraud of the company, of the scrip certificates contained in the book No. 39, so taken from the office by Mr. Brodie; that the defendant Harrison had assisted Brodie and Harman in their acts or proceedings which were to enable them to practise

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these frauds; that the scrip certificates so made use of by Brodie, Harrison, and Harman amounted to 1,490, and the same were spurious scrip certificates, and had been cut from the missing book, No. 39; and that the remuneration they had paid themselves had not been sanctioned by any meeting of the company.

[His honor, after going through the details of the charges, proceeded:]

If the case had to be decided upon the merits, the plaintiff could not have obtained any decree grounded upon these charges; for, in the first place, as to the case against the defendant Mr. Brodie, which I deal with as being the one most strongly relied on, and which certainly is the strongest case in the plaintiff's favor, I see nothing in the evidence which could justify the court in considering him to have been a party to any such fraud as was alleged, nor indeed any evidence which could lead to the inference of participation in it, beyond the fact of his having been for some time in possession of the book or collection of documents by means of which the fraud was alleged to have been committed, and not accounting for the book, nor for the fact of such possession or retention.

But it would be going beyond authority and beyond principle if I were to hold a party chargeable for a fraud on the mere ground that the document, by means of which the fraud had been perpetrated, had been in his possession, and was not accounted for. And as to the case of wilful default on the part of Mr. Brodie, I think the statements do not raise the question. If such a case were raised, it would be inconsistent with the case of fraud as alleged. As to the defendant Harman, who, being merely secretary of the company, cannot be charged on any other ground than that of fraud, the evidence fails to show that he has ever had possession of the document by means of which the fraud was or could have been perpetrated.

Without looking to the defence, therefore, the plaintiff, I think, has failed to substantiate his case. But whatever might have been the result as to this part of the case if the question had depended solely upon the evidence to which I have referred, some passages read by the plaintiff from the answers seem to remove all doubt, for the answer of Mr. Brodie shows that he knew nothing of the matter. I am of opinion that if the case could have been determined upon the merits, the bill must have been dismissed as to the 1,490 shares; and it must also have been dismissed as to the directors' remuneration. As to this part of the case, the plaintiff has read the statements in the defendant's answer which completely and satisfactorily explain it. Having regard to the charges of the bill, whatever relief might have been given as to the other matters, these parts of the bill must have been dismissed, with costs. To what extent any decree as to the other matters could have been serviceable to the plaintiff I am unable to judge. But under the circumstances I feel it my duty to dismiss this bill, with costs, to be paid wholly by the official manager. I find it alleged in the answers of some of the defendants, that this suit was instituted by one who had formerly been the solicitor of the company, and that the plaintiff was indemnified by him; and although the

## Roberts's Case.

former has been examined on the part of the latter, I do not find that he contravenes that allegation. The character of his evidence satisfies my mind that the suit had its origin in other motives than the benefit of the shareholders of the company. It is not within my province to decide whether the costs the official manager will have to pay ought to be made good to him out of the assets of the company; but after having read through the pleadings more than once, I have no hesitation in stating my opinion to be, that the bill contains charges which (looking at the evidence given in support of it) ought never to have been made; that the suit was improperly constituted in its inception; and that whether it be looked at with reference to its frame, or upon its merits as to the principal question at issue, it ought never to have been adopted by the official manager. The bill must, therefore, I repeat, be dismissed, with costs, to be paid by the official manager.

ROBERTS'S CASE.<sup>1</sup>

June 25, 1852.

*Contributory — Costs.*

R. had agreed to become a provisional committee-man, and in answer to a notification that he might have 100 shares, had applied for 100 shares. The managing committee had resolved that each provisional committee-man must take twenty-five shares. The managing committee afterwards resolved not to proceed with the company, and applied to R. for 105*l.* treating it as a call of 4*l.* 4*s.* on each of twenty-five shares, and stating, that on payment of 105*l.* R. should be protected from the creditors. R. paid the 105*l.* :—

*Held*, that he was not a contributory.

Costs of appeal from the master's decision paid out of the estate.

KINDERSLEY, V. C. This case comes on by way of appeal by the official manager from a decision of the Master, excluding the name of Mr. Roberts from the list of contributories. On the part of the official manager it is contended that the case falls within the principle of *Upfill's case*, 14 Jur. 843; s. c. 1 Eng. Rep. 13; because as in that case, so here, there is the concurrence of two conditions: first, that Mr. Roberts was a member of the provisional committee; and, secondly, that he had agreed to take shares. Now, that Roberts was a member of the provisional committee is not in dispute, and it is contended by the counsel for the official manager, that the agreement to take shares is established on three grounds: first, that Mr. Roberts signed the agreement required by the Registration Act, by which he agreed to take shares; secondly, he applied for shares, and had a letter of allotment; and, thirdly, he paid a deposit or call upon the shares thus allotted. On the other hand, it is insisted by Roberts that there was

<sup>1</sup> 16 Jur. 681.

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Roberts's Case.

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never any final acceptance of shares, and that the payments were only to free himself from legal liabilities to the creditors, according to his notions of the law then applicable to his case. The question really is, whether it is within the principle of *Upfill's case*.

Now, as I understand it, the principle of *Upfill's case* amounts to this—that although a provisional committee-man is not liable as such to contribute to the expenses incurred in endeavoring to form a company which has failed; on the other hand, any individual agreeing to take shares, and even paying a deposit, was not thereby made liable, because they were shares in a company never formed; but still, notwithstanding this, if a provisional committee-man says, “I agree that if the company is formed I will take shares,” and that is final and conclusive between him and the promoters, that then he does become liable, for some reason, to contribute to the expenses of the endeavor to form the company. Now, the principle of *Upfill's case* involves this as a necessary ingredient, that there should be an actual allotment and acceptance of shares; and if there be not, then this does not come within the principle of *Upfill's case*; and I mean to follow what Lord Cranworth said with reference to such cases, that he would not do anything to extend the principles of *Upfill's case*. Now the facts are these:—On the 10th October, 1845, Mr. Roberts sent a letter to Smith, the secretary, requesting that his name might be placed upon the list of the provisional committee, and his name was accordingly so placed. It does not appear that he ever attended meetings or took part in the management, still he was, with his own concurrence, a member of the provisional committee. On the 10th October, 1845, a meeting, calling itself the acting committee, passed a resolution to the effect, that every provisional committee-man must take twenty-five shares to qualify himself for his office as provisional committee-man. Now, considering that it has been determined that the office of provisional committee-man does not imply that anything has been committed, but only means that out of his kindness and love of mankind the committee-man has published his name and his opinion of the scheme, it is not easy to see how a man should be required to hold twenty-five shares in order to qualify himself for that function. However, that was the conclusion come to, but whether the resolution was ever communicated to Mr. Roberts in distinct terms does not appear, except so far as the letter of the 28th October goes; and it will be observed, that that letter does not in the slightest degree allude to the resolution as to the twenty-five shares. Annexed to that letter was a form of application for shares, intended to be filled up by Mr. Roberts, which was accordingly filled up and sent by him.

Now, the question is, what was the intention of the letter sent by Smith, and of the letter filled up by Roberts. The letter sent by Smith was a notification that Roberts might have 100 shares, and the form is not, “I send you 100 shares, will you accept them?” and then Roberts accepted them; but it is, that, in answer to the notification, Roberts applies for 100 shares, and says, that if they are allotted he will accept them, and pay the deposit. This letter did not clench the matter, so that both parties were bound; but Roberts seems to have

## Roberts's Case.

thought that the shares might be allotted, and therefore he required to know how his application was dealt with. What might have been the effect, if, in answer, a letter allotting 100 shares had been sent, I do not inquire; but nothing further was done in the way of communication until the 20th November, when another letter was sent. But on the 17th November a resolution had been come to by the acting committee, that the provisional committee-men should be requested to take up and pay for twenty-five shares. Now, except so far as that was communicated to Roberts, it was not binding, but goes to show the view taken by the acting committee, not that they were going to allot shares, but casting about for means of raising money to discharge their liabilities; and though they had not at that time formed a determination to abandon the scheme, they began to consider how to raise money to pay the expenses, and therefore request each committee-man to pay for twenty-five shares. Now, he had applied for 100, but they do not say they allot him 100, but request as a favor, not as a right, that each will take up twenty-five shares. By the letter sent accordingly, Mr. Roberts was to go to the bankers, and get a receipt filled up, that he might obtain scrip. This he does not do; and very shortly afterwards they come to the conclusion that it was not likely that the company would succeed, and they come to a resolution not to proceed, and another resolution that a letter should be sent to each provisional committee-man, requesting payment of 52*l.* 10*s.* There is no evidence that a letter containing this demand was sent to Roberts, and on the 19th February another resolution was passed, that a call be made for an additional sum of 52*l.* 10*s.*, making a gross sum of 105*l.*, upon payment of which the parties should be protected from the claims of creditors; and a copy of that was sent to Mr. Roberts.

Now, what do these letters amount to? The scheme is abandoned, and the committee consider how the debts are to be discharged. They first fix upon 52*l.* 10*s.*, which they treat as a call of 2*l.* 2*s.* per share, and they then fix on another 52*l.* 10*s.*, and say, "If you pay 105*l.* you shall be protected from creditors." Mr. Roberts, therefore, does pay 105*l.* Can we treat this 105*l.* as a deposit and call for twenty-five shares? If he had paid it, and received a letter of allotment, and all this whilst the matter was going on, it might, perhaps, have been so held; but when the matter is abandoned, and he is told, "If you make this payment you shall be protected from the creditors," and he makes a payment accordingly, you never can bring this within *Upfill's case*. My opinion is, therefore, that neither upon the ground of the allotment, nor on the acceptance, nor on any payment on the shares, can Mr. Roberts be treated as a contributory; and the only reason remaining to be considered is, that he signed the agreement in the form required by the registration office. Now, it has been decided in more cases than one that that does not constitute such an acceptance as will make him a contributory. *Carmichael's case*, 14 Jur. 1014; s. c. 1 Eng. Rep. 66; *Carrick's case*, 1 Sim. (n. s.) 505; s. c. 5 Eng. Rep. 114; and if it had not been so decided, I should have come to that conclusion. It is my opinion, therefore, that the

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Gray v. Rusbridger.

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Master's decision is right, and this appeal must be dismissed, and the provisional manager must pay Mr. Roberts his costs of the appeal, and be entitled to have them again out of the funds in his hands.

*Malins* and *Selwyn* contended that the official manager ought to pay the costs personally, as the case admitted of no doubt.

KINDERSLEY, V. C. I considered the question of costs with reference to this very point. It appears to me that official managers have in general entirely forgotten their own position. They are applying, as they think, at no risk to themselves, and at the costs of the estate; but unless where their own counsel is of a strong opinion that there is a good case, or unless the Master has suggested it, or unless a number of contributories agree to join, I should make the official manager pay, as I should have done here unless I had been of opinion that this was a fair case. It is close to *Uppill's case*, and I think that there was encouragement not improperly given by the Master, that as several cases were pending, on this case there ought to be an appeal.

*Malins* and *Selwyn*, for Mr. Roberts.

*C. P. Cooper* and *Roxburgh*, for the official manager.

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GRAY v. RUSBRIDGER.<sup>1</sup>

July 2, 1852.

*Supplemental Claim.*

In this case a claim had been filed for the appointment of new trustees. It was afterwards discovered that parties not named in the claim were necessary, and before the matter was completed some of the parties died, and it became necessary to bring their representatives before the court.

*Bagshawe* applied for leave to file a supplemental claim, and bring the necessary parties before the court, stating, that in the general orders there was no mention of a supplemental claim.

KINDERSLEY, V. C., thought it came within the general jurisdiction of the court, and gave leave to file the claim.

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*In re Field's Settlement; M'Donnell v. Pope.*

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*In re FIELD'S SETTLEMENT.*<sup>1</sup>

June 11, 1852.

*Practice—Trustee Relief Act—Costs.*

The costs of all parties of and incident to an application by the tenant for life for the payment to her of the income of a trust fund, which has been paid into court under the trustee relief act, will be ordered to be paid out of the *corpus* of the fund, notwithstanding the parties entitled in remainder oppose such payment.

In this case a trust fund had been paid into court under the Trustee Relief Act. The party who was entitled to the income during her life now petitioned for an order for payment of the income to her for her life.

*C. P. Phillips*, for the petitioner, asked that the costs of all parties of and incident to the petition might be paid out of the *corpus* of the fund; and cited, in support of his application, *Re Ross's Trust*, 15 Jur. 241, s. c. 2 Eng. Rep. 148, before Lord Cranworth, V. C.

*W. W. Cooper*, for the parties entitled in remainder who had been served, opposed the payment of the costs out of the *corpus*, this being an application solely for the benefit of the tenant for life.

Sir J. ROMILLY, M. R., however, upon the authority of the case cited on behalf of the petitioner, ordered the payment of the costs of all parties out of the *corpus* of the fund.

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*M'DONNELL v. POPE.*<sup>2</sup>

April 22 and 28, 1852.

*Landlord and Tenant—Change of Tenancy by Acceptance of Rent.*

A house being let to A, A died, leaving B and C her executors. B continued to pay the rent and it appeared to be the intention both of B and the landlord that B should be substituted in the tenancy; but C, the other executor, knew nothing of the intended change:—

*Held*, that such change was inchoate only, and not perfected; and therefore A's estate still continued liable on the lease.

THIS was a claim by the landlord of leasehold premises at Chepstow, in which he sought to recover against the estate of Mrs. Pope, deceased, certain arrears of rent since the year 1847 in respect of the premises in question. The defendants were Miss Pope (Mrs. Pope's

<sup>1</sup> 16 Jur. 770.<sup>2</sup> 16 Jur. 771.



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M'Donnell v. Pope.

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daughter) and Thompson, who were appointed by Mrs. Pope her executrix and executor. Miss Pope had, since her mother's decease, taken the benefit of the Insolvent Debtors Acts.

*Rolt* and *Martindale*, for the plaintiff.

*Daniel* and *Druce*, for the defendants, set up a double defence; first, that the letting was originally a joint letting to Mrs. Pope and her daughter, and therefore survived to the daughter; and, secondly, that if not originally a joint letting, yet the plaintiff had since the decease of Mrs. Pope constituted Miss Pope his tenant, and put an end to the former tenancy.

*Thomas v. Cooke*, 2 B. & Al. 119; *Doe d. Hull v. Wood*, 14 M. & W. 685; *Lyon v. Reed*, 13 M. & W. 285; *Johnson v. Huddleston*, 4 B. & Cr. 932; *Clarke v. Moore*, 1 Jo. & Lat. 723; and *Doe d. Hornby v. Glenn*, 1 Ad. & El. 49, were cited.

*Rolt*, in reply.

The intention to change the tenancy, however clearly appearing, between M'Donnell and Miss Pope, is not effectual without the assent of Thompson. *Graham v. Whickelo*, 1 Cr. & N. 188.

April 28. Sir G. TURNER, V. C., after stating the case. The first point is, whether the letting was to Mrs. Pope alone, or to her jointly with the defendant Miss Pope; and secondly, whether, if that were so originally, the plaintiff, after the death of Mrs. Pope, admitted Miss Pope to be tenant, by the acceptance of the rent from her, and permitting her to retain possession of the premises. As to the first point, it seems pretty clear that the original letting was to Mrs. Pope alone. The affidavits for the plaintiff distinctly state that, and it is nowhere negatived by the affidavits on the other side. Several circumstances were urged as indicating a joint tenancy, but I think they cannot be put higher than as being consistent with a joint tenancy; they are not inconsistent with the view that Mrs. Pope was the sole lessee, and therefore cannot prevail against the direct denial of the joint tenancy by some of the affidavits in evidence. The second point is more open to doubt; but the case for the defence fails here too. For the defendants it was urged, that the circumstances attending the case brought it within *Thomas v. Cooke*; but that case is explained by the case of *Graham v. Whickelo*, and I think it is clearly referable to this ground, that a new letting *in præsenti* to an old tenant operates as a surrender of the old lease; because the landlord has no power to let, except the old lease be surrendered. So, if the new letting be to a new tenant with the assent of the old tenant, because in that case the intention of the parties will be presumed to be, to do such other things as are necessary to be done to give effect to their acts. But we must carry the application of the decision in *Thomas v. Cooke* beyond the reason of the rules, if we are to say that a bare acceptance of rent from the party in possession, without any assent,

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or even knowledge, on the part of the executor of the deceased lessee, shall constitute evidence of a new letting by the landlord to the party from whom the rent is received. There must be an assent to the change by the original lessee, or those claiming under him. After weighing the observations in *Thomas v. Cooke*, I cannot give them more weight here than was allowed them in *Graham v. Whichelo*. The change of tenancy in 1849 was not assented to by the executors of the old tenant. *Thomas v. Cooke* goes entirely on the ground I have mentioned, that there had been an actual letting by the landlord with the consent of the old tenant. The case of *Graham v. Whichelo* explains it very satisfactorily.

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HARVEY v. STRACEY.<sup>1</sup>

June 7 and 8; and July 8, 1852.

*Will — Power — Execution.*

By a marriage settlement, power was given to the wife, if the husband survived her, to dispose by will, immediately, of 3,000*l.*, part of certain funds; and, after the husband's death, of the residue of the funds. Powers were also given to her to dispose by will of certain household furniture; and there was a covenant by the husband that she should have power to dispose by will of certain shares, of her jewels, and of her savings. She died in her husband's lifetime. By her will, expressed to be by virtue of the power and authority of the settlement, after reciting that she had power to dispose of 3,000*l.*, she gave certain legacies and annuities. She then disposed of her savings. She then disposed of the shares and of certain jewels, and then gave the household furniture. She then directed, appointed, gave, and bequeathed all the rest, residue, and remainder of her moneys, and other her personal estate, after payment of debts and funeral expenses, to certain persons: —

*Held*, that the will operated as an execution of her power as to the residue of the funds.

By an indenture of settlement on the marriage of Archibald Morrison and Sarah Morrison his wife, then Sarah Harvey, bearing date the 15th May, 1823, it was witnessed, that Sir Robert John Harvey and John Stracey, the trustees thereof, should stand possessed of the several sums of 20,000*l.* South Sea annuities, 7,000*l.* reduced 3*l.* per cents., 3,150*l.* new 4*l.* per cent. reduced, and thirty shares in a gas company, lately transferred into their names by Sarah Morrison, upon trust that they should, during the joint lives of the said Archibald Morrison and Sarah Morrison, out of the dividends and annual proceeds thereof, raise the yearly sum of 500*l.*, and pay the same to Sarah Morrison for her separate use, in manner therein mentioned; and, subject thereto, should, during the lives of the said Archibald Morrison and Sarah Morrison, pay the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities to, or allow the same to be received by, the said Archibald Morrison and his wife, as therein mentioned; and should, immediately after the

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<sup>1</sup> 16 Jur. 771.

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decease of the said Archibald Morrison, in case he should die in the lifetime of the said Sarah Morrison, pay, transfer, or assign all and singular the said trust moneys, stocks, funds, and securities unto the said Sarah Morrison, her executors, administrators, or assigns, for her or their own proper use and benefit; but if the said Sarah Morrison should die in the lifetime of the said Archibald Morrison, then that the said trustees should, after the decease of the said Sarah Morrison, by and out of the said trust moneys, stocks, funds, and securities, raise the sum of 3,000*l.*, and pay the same to such person or persons, and for such intents and purposes, as she should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or more witnesses, direct or appoint; and in default of such direction and appointment, or so far as any such should not extend, in trust for such person or persons as, under the statute for the distribution of the effects of intestates, would, at the decease of the said Sarah Morrison, have been entitled thereto as her next of kin, in case the said Archibald Morrison had died in her lifetime, and she had died possessed thereof and intestate; and should, after the decease of the said Sarah Morrison, so dying during the life of the said Archibald Morrison as aforesaid, pay the dividends, interest, and annual produce of the residue which should remain of the said trust moneys, stocks, funds, and securities, (after raising thereout the said sum of 3,000*l.* aforesaid), to, or permit the same to be received by, the said Archibald Morrison and his assigns, for his life; and should, after his decease, stand so possessed of and interested in the same residue, and the dividends, interest, and annual produce thereof, in trust for all and every, or such one or more, exclusively of the others or other of the relations in blood of the said Sarah Morrison, at the time of her decease, within the eight degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and if more than one, in such shares and proportions, and with such annual sums of money, and future or executory or other trusts, such annual sums of money, and future or executory or other trusts, being for the benefit of the said relations in blood of the said Sarah Morrison within the degree aforesaid, or some or one of them, in such manner as the said Sarah Morrison should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses, direct or appoint; and in default of such direction or appointment, and so far as any direction or appointment should not extend, in trust for such person or persons, as, under the statute for the distribution of the effects of intestates, would, at the decease of the said Sarah Morrison, have become entitled thereto as her next of kin, in case the said Archibald Morrison had died in her lifetime, and she had died possessed thereof his widow and intestate.

There was also a covenant by the said Archibald Morrison and his

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wife to transfer to the trustees the sum of 54,000 francs, in the French funds, upon the same trusts. And by the said indenture certain plate, books, and household effects of her, the said Sarah Morrison, were assigned by her to the trustees, upon trust to permit and suffer the same to be used and enjoyed by the said Archibald Morrison and Sarah his wife, jointly, during their joint lives; and if the said Sarah Morrison should die in the lifetime of the said Archibald Morrison, then upon trust to permit the same to be used and enjoyed by the said Archibald Morrison during his life; and after his decease, upon trust for such person or persons, and for such intents and purposes, as the said Sarah Morrison should, notwithstanding her coverture, by her last will or testament, or any codicil or codicils thereto, to be signed and published in the presence of, and to be attested by, two or more credible witnesses, direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, in trust for such person or persons as under the statute of distributions would, at the decease of the said Sarah Harvey, have been entitled thereto as her next of kin, in case the said Archibald Morrison had died in her lifetime, and she had died possessed his widow and intestate.

And in the said indenture was contained a covenant by the said Archibald Morrison, that he, the said Archibald Morrison, his executors and administrators, would permit and suffer the said Sarah Morrison, from time to time, and at all times thereafter, notwithstanding the said intended coverture, to have, use, wear, and enjoy, to and for her sole and separate use, as her own separate property, and either in her lifetime, from hand to hand or otherwise, or by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed by her own hand, to sell, give away, or dispose of, to any person or persons, or for any intents and purposes whatsoever, certain shares therein mentioned as belonging to her in the Norwich public libraries or institutions, and her ticket of admission in the Norwich theatre, and all her jewels, pearls, watches, trinkets, and other personal ornaments, and also all the money and effects which she might save or purchase out of the income thereby settled for her separate use, or which might arise from the sale of any of her separate chattels or effects.

Sarah Morrison made her will, dated the 23d May, 1825, and attested, as to the signing and publication thereof, by two credible witnesses, as follows: — "I, Sarah, the wife of Archibald Morrison, of &c., do, by virtue of the power and authority reserved to me in and by the deed of settlement made on my marriage, and bearing date the 15th May, 1823, make, publish, and declare this to be my last will and testament, in manner and form following, that is to say — whereas by virtue of the said settlement I am entitled to dispose of the sum of 3,000*l.* by will, immediately on my decease; now, I do hereby direct and appoint the same to be paid to the persons and for the purposes hereinafter mentioned, and I give and bequeathe the same as follows, that is to say," &c.

She then gave legacies to the amount of about 1,000*l.*, and then proceeded as follows:—“ And I do further direct and appoint that my executors, hereinafter named, do and shall, out of the said sum of 3,000*l.*, raise a competent sum of money to produce the annual sum of 25*l.*, and place the same on government or real security during the natural life of my servant, Mary Sewell, whether she shall be in my service or not at the time of my decease, and pay the said annuity to the said Mary Sewell during her life, as the same shall from time to time become due, for her own use; and from and after the decease of the said Mary Sewell, then I desire that the sum of money so invested for securing the said annuity shall become part of the residue of my personal estate; and I direct and appoint that all the remainder of the said sum of 3,000*l.*, together with the said sum of money set apart for securing the said annuity to the said Mary Sewell, in case she shall die in the lifetime of my said husband, and also any sum of money which I may save from and out of the annual sum of 500*l.*, reserved to me by my said settlement in the nature of pin-money, if the same shall exceed 1,000*l.*, shall be severally continued out at interest by my said executors, or the survivor of them, during the life of my said husband, and that he shall be at liberty to receive the interest or dividends thereof, as the same shall arise, during his life, for his own use; and from and after his decease, then that the said severally last mentioned sums shall become part of the residue of my personal estate; but in case such savings should not exceed 1,000*l.*, then I give all such savings to my said husband absolutely. Item: I do hereby nominate, constitute, and appoint my said husband, Archibald Morrison, and my said nephew, Sir Robert John Harvey, to be executors of this my last will and testament.”

She then disposed of the shares in the Norwich institutions, and gave various jewels, pieces of plate, and articles as legacies; and then proceeded as follows:—“ Item: I give and bequeathe to my said nieces, Fanny Bellman, Emma Squire, and Judith Turner, the sum of 200*l.* each, to be severally paid them within six months after the decease of my said husband, or my death, if I should survive him. And I give and bequeathe to my said husband all the rest of my household furniture, household linen, common china, and all other articles for domestic or culinary purposes; and after payment of all my just debts, funeral expenses, the charges of proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeathe, after the decease of my said husband, all the rest, residue, and remainder of my moneys, and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Harvey, the said Charles Day and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savill Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my

nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continued out at interest by my surviving executor, his executors or administrators, on government or real security, during the respective lives of my said nieces, and the dividends or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, and for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally, share and share alike, but the issue of any deceased niece is only to be entitled to the share which his or her mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct, that after the several deceases of my said last-mentioned nieces, or their respective husbands, the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form, as she may, by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeathe the same; and in default thereof, then unto the next of kin in blood of my said niece, according to the statute of distribution of intestates' personal estates."

The testatrix, Sarah Morrison, made seven codicils to her will, giving other annuities and legacies, and died on the 15th February, 1827, leaving her brothers, John Harvey and Charles Savill Onley, her next of kin. Her husband, Archibald Morrison, died in May, 1848. At the death of Sarah Morrison she had saved 1,451*l.*, which, with 3,000*l.*, was afterwards invested in the names of her executors. These sums were insufficient to answer the annuities and legacies given by her will, and having been exhausted, the various appointees and legatees under her will claimed the residue of the settled property, as having been well appointed by her will. The representatives of her next of kin, however, claimed it as unappointed, and the surviving executor, Sir Robert John Harvey, filed a bill on the 3d April, 1849, in order to take the opinion of the court on the will and settlement. The Master having made a report as to the several persons entitled under the will, the cause now came on for argument on further directions. The first question argued was, whether the will operated as any appointment at all of the residue. Another question was, whether the appointment made was not an excessive execution. As to the first question,

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*Follett and Busk*, for the plaintiff.

*K. Parker and Haynes*, for the representatives of one of the next of kin. We admit that the will is a good exercise of the power as to the 3,000*l.* and the savings and jewels; but as to the residue, if the will operates under the power to dispose of it, it should appear that that power is referred to, and we contend that it is not. The power is a special power, and does not authorize the payment of debts, which the testatrix directs. She also speaks of "my personal estate," which would not include property over which she had only a power. There must be a reference either to the property or to the power. If there is any doubt about it, the court cannot declare that the power has been exercised. *Denn v. Roake*, 5 B. & Cr. 720. It is clear, besides, that this is not an exercise of the power. *Andrews v. Emmett*, 2 Bro. C. C. 227; *Jones v. Tucker*, 2 Mer. 533; *Lovell v. Knight*, 3 Sim. 275. There is no reference to the trustees of the settlement, and no mention of the power to dispose of the residue. *Lempriere v. Valpy*, 5 Sim. 108; *Hughes v. Turner*, 3 My. & K. 666.

*Oliver*, for the representatives of the other next of kin.

*Campbell and T. C. Wright*, for some of the parties entitled under the will. The power of disposition over the 3,000*l.* is absolute; the power over the residue does not operate till the death of her husband. Now, she had the settlement in her eye at the time of making her will, and refers to it, and to all the powers given by it. Every single specific sum and chattel mentioned in the settlement is disposed of by the will. She uses the words "direct and appoint, give and bequeathe, after the death of my said husband;" thereby making a distinction between what she had absolute power to dispose of, and what she could not dispose of till his death. These words amount to the execution of a power—*Pidgely v. Pidgely*, 1 Coll. 255, and it would be strange if the subsequent words could cut it down. It is true, that she gives to her husband for life that which he already had; but that only shows that she did not rigidly adhere to the power. An invalid bequest as to part does not make the rest of the bequest bad. The direction to pay the debts, though bad, does not nullify the rest. Having a general power, there was no inconsistency in directing payment of debts. [The following cases were cited:—*Monk v. Maudslay*, 1 Sim. 286; *Churchill v. Dibben*, 9 Sim. 447; *Morgan v. Surman*, 1 Taunt. 289, in which there was no reference to the power or to the subject-matter; and *Carver v. Bowles*, 2 Ry. & M. 304, in which an invalid appointment as to part did not cut the whole down.] So in *Whittell v. Dudin*, 2 J. & W. 279; *Bailey v. Lloyd*, 5 Russ. 340; and *Alexander v. Alexander*, 2 Vern. 640. In none of the cases cited on the other side was the power referred to. *Hughes v. Turner*, 3 My. & K. 666; *Clogstoun v. Walcott*, 13 Sim. 523.

*L. Wigram and Law*, for other parties in the same interest. When a person speaks of personal property, the technical words are seldom

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used in their correct sense. *Lovell v. Knight*, 3 Sim. 275. What can she mean unless she refers to the property under the power?

[Sir R. T. KINDERSLEY, V. C. She may have separate estate.]

That has not been considered in the latter cases. 1 Sugd. Pow. 403, 7th ed. This property was all her own originally, and no doubt, speaking in the popular sense, she meant to allude to it here. Why should the words at the beginning of the will be taken to allude to one power only?

[*Kemp v. Jones*, 2 Kee. 756, and *Sadler v. Pratt*, 5 Sim. 632, were cited.] The word "residue" is the same which was used in the settlement.

*Walker, J. Russell, Bacon, Baily, Rogers, Hall, Bigg, Baggallay, N. Wetherell, Keene, E. R. Turner and Kingdon*, for other parties.

*Maddison v. Andrew*, 1 Ves. 61; Sugd. Pow. 274; *Gray v. Garman*, 2 Hare, 274; *Salisbury v. Petty*, 3 Hare, 86; and *Elliot v. Elliot*, 15 Sim. 321, were also cited.

*K. Parker*, in reply. There are ample subjects in the settlement in which the words of the will may attach. The surplus of the 3,000*l.* and savings are sufficient to satisfy the word "residue." Everything in the will refers to her own separate property, and it is all given to her executors, who would not take under the power.

July 8. Sir R. T. KINDERSLEY, V. C., now delivered judgment. He stated the contents of the settlement, and observed that there were four portions of property: first, the 3,000*l.*; secondly, the residue of the fund; thirdly, the furniture, plate, &c.; and, fourthly, the shares in the literary institutions, the ticket of admission, the jewels, &c., and the savings. He then stated the contents of the will, making the following observations:—The first clause was of very great importance. She sets out not only by referring to the instrument which creates her power of testamentary disposition, but says that the will which she is now making is made by virtue of the power and authority reserved to her by that settlement. With respect to the savings, of course, being savings out of her own separate property, it required no special power to enable her to dispose of them by a testamentary instrument; but still the settlement does deal with them, to the effect of professing to give her a power of disposing of them by will, as well as of her jewels and ornaments, and her shares in the institutions, and ticket, as to which latter property of course, she could have no testamentary power except as given by the settlement. There was then a general reference to the settlement, and a special reference to the power to dispose of the 3,000*l.*, and a disposition professedly of that 3,000*l.*, and a disposition of part of another portion of the property, without any special reference to that particular power, as there was with reference to the particular power enabling her to dispose of the 3,000*l.*; and afterwards, without any further special reference, she disposes of part of the property comprised in the fourth



portion, and part of that comprised in the third, calling it her own. She seemed to think that the will would have operated if she had survived her husband, which, of course, was not the case, and she gives him life-interests, which he already possessed under the settlement. In the previous parts of the will there was, without reference to any special power, an actual disposition of the property comprised in the third and fourth portions, but no specific reference to the special power which she had over the second portion, which formed the great bulk of the property, nor any actual gift of anything which in description necessarily embraces any portion of that property; unless, then, she does exercise the power of disposing of the second portion by the clause containing the gift of the residue, she has not disposed of it at all.

There is no doubt that the description "my moneys, and other my personal estate, of whatever description the same may be," in itself, does not import property over which she had only a power, and which she could not in any way deal with unless she exercised that power, but she appoints and bequeathes that property to persons who come within the description of persons in whose favor that special power was created, namely, relations within the eighth degree of consanguinity to herself, nieces being of course of the third degree. [His honor then proceeded]: The question, whether a will, assuming it to be, as in this case, duly executed with the formalities required by the law, operates as an execution of a power, is like every other question upon the construction of a will, purely a question of intention. It is a question of intention, and the courts have determined, and necessarily determined, that there are two modes in which that intention may be manifested; the one is by the will referring to the power itself, and expressing its intention to execute that power, although not referring to the special property comprised in the power; and the other is by dealing with the special property comprised in the power, without referring to the power itself, and that is commonly enunciated by the proposition which is well established by all the cases, however it may have been actually adhered to in the application of the rule. It is commonly said, that to make a will an execution of a power, it must refer to the power, or the property comprised in the power.

What is there on the face of the will to indicate any intention to execute the power? I have to determine, then, this question as to the property comprised in the second portion of property, which is that which I have now to determine; because, as to the rest, there is no question as to the part comprised in the first portion. As to the property comprised in the third and fourth portions—that is, the plate and linen, and the shares in the institutions, the ticket of the theatre, the jewels, and the savings of the income—as to those there is no question but that there is an execution of the power as to all of those. The question I have to determine is, did she intend to execute the power as to the three portions of the property, being the smaller portions of the property, the least considerable portions, and not to execute the power as to the great bulk of property? No

doubt it is perfectly possible that she did so, and I am not to conjecture that it is so probable that she should have such an intention, that therefore I am to determine, upon that ground, that she did mean to execute the power as to the second portion. But what do I find here? She sets out by not only referring to the settlement which created the power, but she sets out by saying that she now makes this testamentary instrument, this will, by virtue of the power and authority reserved to her in and by the deed of settlement, in manner and form following. Now, it does appear to me, that unless there be something making it almost impossible to imagine, that as to some particular portion of the property she meant to execute it *prima facie*, that clause alone appears to me to lead strongly to the conclusion that she did intend to exercise the power as to all. But then it is said she refers there to the power and authority. Now, it is said she had four powers; she does not say, "by virtue of all the four powers I make my will," but "by virtue of the power and authority." And, moreover, she proceeds immediately afterwards to recite one of those powers; that is, the power to dispose of one of those portions of property, namely, the 3,000*l*.

Now, no doubt, in technical language, and without impropriety, this lady may be said to have had four powers; but, on the other hand, with an equal propriety of language, she had a power and authority by that settlement to dispose of four portions of property; she had no power to make a will at all, except indeed as to the savings — she had no power to make a will at all as a married woman, except as it was given to her by the settlement; and she says, "Now, having no power to make a will, except by the settlement, I, by virtue of the power and authority given to me to make a will, do dispose in the manner and form following;" and then, though she only afterwards mentioned specifically one of those powers, or, to use another form of language equally appropriate, the power to dispose of one of those portions of property in specific terms, she does, without referring to the particular clause which gave her the power to dispose of the third portion and fourth portion, actually dispose of them. Well, if the specific reference to the power to dispose of the first portion only is a reason why I am to infer that she did not mean to dispose of the second portion, it would be equally a reason why I should presume that she did not mean to dispose of the third and fourth portions; but I am precluded from such a supposition, because she has actually disposed of them. Therefore it does not appear to me, after the general reference to the power, the reference to the particular power which she sets out by reciting for the purpose of describing the 3,000*l*. — it does not appear to me that reference to that particular power, without reference to the other power, is a reason why I ought to come to the conclusion that it was not her intention to execute the power to dispose of the second portion of property.

But I find, that when she is disposing, clearly and beyond all controversy, of some of the property comprised in the third and fourth portions, she used, with regard to that property, precisely the same language which she is using in this clause which is now under con-

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sideration, namely, the term, "my shares, my plate, my books" — everywhere speaking of everything that she disposes of; I will not say of everything, but most or many of the articles she is disposing of, where she is clearly and confessedly executing the power, still as her property. Now, it has been held over and over again, that if there be no reference to the power, and the will purports to be made in pursuance of the power, it is necessary to describe the property; but the words "my personal estate" would be sufficient. If a man says, "Whereas I have power to dispose of such and such a sum of money under settlement, and I do, by virtue of that power, dispose as follows—I give all my money to A B," it has been held over and over again, that his describing it as his money does not prevent it being an exercise of the power, because there is a reference to the power itself. Now, then, let me put the question in this way. Suppose there had been no power in this settlement except the power to dispose of that which is the second portion of the property in this settlement; and suppose this will had set out, as it does, by saying, "I do, by virtue of the power and authority given me by settlement, make this my will in manner and form following," and then she adds, "I give all my money and other my personal estate, of whatever description, to A B," a person within the class in whose favor the power is created and is to be exercised; surely within the authorities it would be sufficient to operate as an execution of the power.

Then the question is this—am I to say, that because there was power and authority to dispose of four other portions of property, (and she uses the term "power and authority" in the singular number), that therefore I am to hold—for that is what I should have to hold—that there is no reference to the power and authority to dispose of the second portion of property? It really appears to me, that the question resolves itself into this, it being admitted that there is no reference to the property in itself comprised in the second portion. It appears to me clearly, that there is such a reference, and that when she uses the term "power and authority," she meant to use the term not in the technical sense in which a lawyer would say, "she has four different powers under that settlement," but she meant to say "the power;" and not only the power, but she adds the words "the authority" which was given to her by that settlement to make a will disposing of the various portions of property which are the subject of that settlement. I have therefore no hesitation in saying that I do not doubt about her intention to exercise the power, and to dispose of the property comprised in the second portion; and it certainly is not a little striking how, with respect to every portion of property which she professes to dispose of, she always has regard to the question, whether, under the terms of the settlement which gives her the power, her power is capable of being exercised to take effect immediately on her death, or only to take effect upon the death of her husband surviving her.

Now, I may observe, that if it be said, as it is contended, that this clause, which only uses the term, "all the rest, residue, and remainder of my moneys, and other my personal estate," meant to dispose of

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nothing but what might be hers, irrespective of any power created by the settlement, it is to be observed, that she does not give that to anybody until after the death of her husband; so that I must attribute this intention to her, if that be the true construction — that she meant to dispose of some property, which, irrespective of the settlement, she had power to dispose of, in favor of her husband, but in such a way that it would be undisposed of as long as the husband lived, and the gift only took effect upon the death of the husband. Then, again, I do not mean to say that that might not be the intention. It is not conclusive on the question, but all these matters, which I must necessarily look at in considering the will, combine, and lead to the same conclusion, that her intention was to exercise the power with regard to every portion of the property. Then it is said, that in this clause — the clause on which the question necessarily chiefly turns — she makes this property subject to the payment of all her debts, and that that is an indication that she did not mean to exercise the power; because, as to the property comprised in the power, she had no right to make it subject to her debts, or to her funeral expenses, or to the charges of proving her will.

Now, it must be considered what, if the construction which I think is the right one be adopted, would be comprised in this gift. First of all, of course, there would be the property comprised in the second portion, namely, the bulk of the portion, the whole stock, and the gas shares, after deducting the 3,000*l.* But there is more she had when she disposed of the 3,000*l.*, or professed to dispose of the 3,000*l.*; she has given about 1,000*l.* of it, or something less than 1,000*l.*; she had given a sum out of it to meet a life annuity to her servant, Mary Sewell; and then she had directed, that what was to be set apart to answer Mary Sewell's annuity should become part of what she calls "the residue of my personal estate;" and then she directs, that what would still remain of the 3,000*l.*, and also the stock set apart to meet that annuity if Mary Sewell died before the husband, and also the savings which she might make out of the 500*l.* a year, if at her death they exceeded 1,000*l.*, should go to the husband for his life, having first said that the fund to answer the annuity is to fall into the residue of her personal estate, and is to go to the husband for his life; and then, after his death, all that is to become what she calls "part of the residue of my personal estate;" so that what she describes here as "all the rest, residue, and remainder of any moneys, and other my personal estate," clearly is meant, as to part of it at all events, to embrace some property which, *ex concessis*, and without controversy, she is disposing of only by virtue of the powers given her by the settlement. The whole property had been originally hers. The whole property was still hers in this sense, that there was no limitation to children. It was not the ordinary marriage settlement, giving it to the husband for life, the remainder to the wife for life, the remainder to the children of the marriage, and so on, with an ultimate limitation, as the wife should appoint; but it is given, subject to the pin-money of 500*l.* a year for herself, to her and her husband for their joint lives; if she survive the husband, the whole to go to her; if she do not survive her

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husband, then, as to a good deal of it, her husband to have a life income only, and then to be at her disposal; and as to the rest, to be at her disposal, without leaving income of the property. That was the disposition of the property both before and after the settlement had taken place; she looks at the whole property as her property; she speaks of it as hers; and this is not conjecture, because she tells us she means by her property comprised in the settlement, "my plate, my books, my ticket of admission to the theatre, my shares in the Norwich Literary Institution, and my furniture," both where she is giving to her husband, and where she is giving to other persons; and then she winds up the whole — having stated, that "certain portions of what I am appointing by virtue of the power shall fall into the residue of my personal estate, and having disposed of everything, with the exception of what I have directed to fall into the residue of my personal estate, and that which the settlement calls the residue of the funds, after setting apart the 3,000*l.*" — by giving all the rest and residue of her property, after the death of her husband, who, by the terms of the settlement or by this will, was to have the life interest in it, (if it be an exercise of the power) — after the death of the husband, to certain persons within that degree of consanguinity within which alone she could appoint to relations.

I think that this is a far stronger case than many of the cases — I think I might say most of the cases — which have been decided to be a valid execution. It is a stronger case than that case in Lord Kenyon's time which was referred to — I mean the case of *Churchill v. Dibben*, which has only comparatively recently been made public, and is the subject of observation by the present Lord Chancellor in his book on powers. In that case, if I am not mistaken, there was no reference to the power at all. However, it is in vain for me to go through all the cases, and distinguish this case from some, or show that it is more like others, or show that it is a stronger case than others. It is sufficient, I say, that the principle being established, about which there really is no controversy, that it is a question of intention, and that there must be reference to the power, or reference to the property, those principles being elementary, and beyond all controversy. I think it would be a loss of time, and attended with very little advantage, to go and compare the language of the instrument in this case with the language of the instrument in other cases; for of course there must be a great variety — a great dissimilarity; but it is sufficient for me to say, that having carefully gone through — perhaps it would be bold to say all the cases, they are so numerous — but having gone through, not only the cases cited before me, but a number of other cases, and carefully considered them, the conclusion I have arrived at is, that this is a stronger case than almost any case which has been decided in favor of the execution of the power, where the question has arisen whether there is a sufficient reference to the power — unless it be a case where a party describes the particular property.

[His honor then proceeded to state his opinion on the validity of the limitations to the nieces, and other persons mentioned in the will; but he was reminded by the counsel for the next of kin, that, by agree-

ment, that question had not been argued before him, as it would have been unnecessary to decide it if his honor's decision had been, that the power was not exercised at all; that question, therefore, stood over for further argument; and his honor proceeded:]

I would only advert, then, to the question, whether the fact of there being this appointment in favor of persons—that is, not actually an appointment, but an attempt to limit what is appointed in favor of persons not objects of the power—whether I am to consider that a sufficient argument for the conclusion, that she did not mean to exercise the power at all, that she did not intend to refer to the property entirely undisposed of, and meant to leave the bulk of it entirely undisposed of. *Carver v. Bowles*, 2 Russ. & M. 304, is a strong authority on the point; and I must say, irrespective of that case, that when I find that all she is doing is this—she appoints it to her nieces, but she thinks that it would be very expedient to protect the nieces, and to take care that each share should be settled to the husband of the niece, if she left one, and to the children of the niece, and in default of appointment to the next of kin in blood to the niece—it does appear to me that there is no ground, in face of the strong argument to the contrary, sufficient to lead me to the conclusion that it was not a valid execution of the power. It ought to be observed, with reference to that clause which I did advert to, where she directs that this gift is to take effect after payment of all her just debts and funeral expenses, that the property which, according to the construction I am putting on the will, was embraced in this devise, would not only be such property as could be made subject to her debts, but would comprise property which, under this very settlement, she could make subject to her debts and funeral and testamentary expenses, namely, the residue of the 3,000*l.*, and also the property comprised in the fourth portion—the jewels, books, &c., and the savings of her pin-money. It is true that, as I have said before, she might have disposed of the savings of her pin-money, as the savings of her separate property, without a special power; but then it certainly is to be borne in mind, that, though it is unnecessary, the settlement itself does purport to contain, in the shape of a covenant by the husband, a power to her to dispose of that by will; and she says, “What I am disposing of, I dispose of by virtue of the power and authority given by the settlement.” Without going further, then, at present, my opinion is, that the will is a valid execution of all the powers.

[The arguments and judgment on the other question will be reported hereafter.]

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Cole v. Muddle.

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COLE v. MUDDLE.<sup>1</sup>

July 22, 1852.

*Executor — Purchaser from one Executor.*

T. was appointed executor along with two others, and took also a beneficial interest in the estate. In 1844, a bill was filed for administration of the estate; in 1845, T. assigned certain leaseholds, in which he was beneficially interested to the extent of one third, to M., for securing his own debt. It turned out that at that time T. was also indebted to the estate:—

*Held*, that the other executors had a lien on the leaseholds so mortgaged in preference to M.; and a bill against M. to establish that lien, and to obtain the title-deeds, (which were in M.'s possession), was allowed, with costs against M.

THE facts and arguments sufficiently appear from the judgment.

*Kenyon Parker, F. T. White, C. P. Cooper, and J. S. Moore*, for the different parties.

*Forbes v. Peacock*, 1 Ph. 717; *Taylor v. Hawkins*, 8 Ves. 209; *Jones v. Smith*, 1 Hare, 55; and *Morris v. Livie*, 1 Y. & C. C. C. 380, were quoted. See also *Drew v. Lord Norbury*, 3 Jo. and Lat. 267; and *Jenings v. Bond*, 2 Jo. & Lat. 720, as to *lis pendens*.

SIR G. TURNER, V. C. This seems a pretty clear case, although the position in which it comes before me is somewhat singular. The bill is filed by two executors for the recovery of the possession of title deeds now in the possession of Muddle, claiming as mortgagee. The Master's report finds, in effect, that there was no mortgage. That finding has been appealed from, and the court has agreed with the master, and decided that there is no mortgage; and yet this bill, filed for the purpose of obtaining the deeds, takes no notice of the fact that there is no mortgage. The testatrix, by her will, bequeaths twelve leasehold houses to three trustees, upon trusts for sale; and then, as to three-fourths of the property, or the proceeds of any sale, upon trust for other persons; and as to the remaining one-fourth, upon trusts for the benefit of John Townsend. The three trustees, who were the two plaintiffs, and a person named Chevaux, were also appointed executors; and the testatrix directed that John Townsend, when he should attain the age of twenty-five years, should be added to her trustees, and should also be an executor. John Townsend having attained the age of twenty-five years in the lifetime of the testatrix, and Chevaux having renounced and disclaimed, probate was in 1844 taken out by the two plaintiffs, Cole and Martin, and by the defendant John Townsend, now out of the jurisdiction.

In December, 1844, a suit of *Townsend v. Townsend* was instituted for the administration of the testatrix's estate, in which suit the Master found that in July, 1845, the defendant, John Townsend, had in his hands the sum of 2,060*l.* belonging to the testatrix's estate, and

that he was indebted to her estate in that amount. In this state of things, John Townsend, in 1845, mortgaged the property in question, together with other property, to one Arden, for securing 300*l.* and interest. This mortgage was assigned to the defendant Muddle. At the time of the mortgage, Arden had notice of the will under which John Townsend claimed, by which will it appeared that the property in question was not bequeathed to Townsend absolutely but jointly with two others, and that Townsend took a beneficial interest in one fourth part only, and that in the other three fourths other parties were beneficially interested. The effect of Townsend's assent to the bequest in the will can only extend to one third. Then the other two executors file a bill to have the title-deeds given up by the mortgagee of their co-executor and co-trustee, who was himself also beneficially interested to the extent of one fourth in the premises mortgaged.

I will try the question as if it were a bill filed by the two plaintiff's against John Townsend for these title-deeds, setting the circumstance of the mortgage on one side for the present. This way of trying it is the most favorable for Muddle. Could Townsend hold the deeds against the two other executors? First, could he hold possession of the estate? The answer to his claim to be entitled to do so would be, "We are executors equally with yourself; we have never conveyed to you; we must have a receiver." And I think it clear that on a bill filed by the present plaintiffs, stating that Townsend was a debtor to the estate, and to them as executors, a receiver would be appointed. On what ground? Evidently because of the lien on the property vested in them concurrently with Townsend, in their character of joint trustees. And must it not equally follow that Townsend could not retain possession of the title-deeds, if he could not retain possession of the land? Then, supposing the title-deeds to be recovered against Townsend, in whom is the better custody? In the executors representing the estate to which Townsend is indebted, or in Muddle, to whom Townsend has conveyed, with notice of the will? *Priddy v. Rose*, 3 Mer. 86, has decided that the equity of the estate to which the alienor is indebted will prevail over the equity of the alienee. Some of the cases may have gone to a considerable length; but this is going no further than a court of equity properly ought to do. This lien must prevail over Muddle's interest, which is created by a mortgage of John Townsend to him. It was argued that John Townsend executed the mortgage in his character of executor, and that one executor alone may deal with leaseholds. He certainly may for the benefit of his testator's estate; but this mortgage was given for securing an antecedent debt previously due to Muddle by Townsend; and the equity of the general estate of the testator must prevail over the private debt of an executor. The deeds, therefore, must be brought into court, with a declaration that they belong to all the three trustees, and that the estate of the testator has a lien on them in priority to Muddle, for securing the amount due by John Townsend to the estate. This decree will be, with costs, against Muddle.



*In re Bangley's Trust.**In re BANGLEY'S TRUST.*<sup>1</sup>

July 16, 1852.

*Trustee Relief Act—Costs.*

A trust fund had been paid into court under the Trustee Relief Act; the tenant for life petitioned for payment of the dividends to her:—

*Held*, that the costs of the application must come out of the income, and not out of the corpus.

The case of *Ross's Trust*, 15 Jur. 241; s. c. 2 Eng. Rep. 148, disapproved of.

GEORGE BANGLEY, by his will, gave to three trustees therein named 6,000*l.* bank 3*l.* per cent. annuities, upon trust, as to the dividends and interest thereof, for the sole and separate use of Isabella King, the wife of William King, (then Isabella Emblem), during her life, independent of any husband she might marry, his debts, contracts, or engagements; and from and immediately after the decease of the said Isabella King, he directed the said bank annuities, and the dividends and interest thereof, to be in trust for all and every the children and child of the said Isabella King as therein mentioned; and in default of children, then he directed the said bank annuities to be divided into three equal parts or shares, and one of such parts or shares to be in trust for each of the following charitable institutions—that is to say, the London Orphan Asylum at Clapton, the Philanthropic Society in St. George's Fields, and the St. Ann's Society's Schools, St. Ann's, London and Brixton. There were no children of the marriage of Mr. and Mrs. King. One of the trustees of the fund having died, and another having disclaimed, the remaining trustee, on the 4th February, 1852, paid the 6,000*l.* consols into court under the Trustee Relief Act. The trustee and the tenant for life, Mrs. King, now petitioned for the payment of the dividends of the stock to her for life, or until the further order of the court; and the petitioner prayed that the costs of all parties of and incident to the application should be paid out of the corpus of the fund. To save expense, the parties entitled in remainder had not been served, the only party served being the husband of Mrs. King.

*Goren*, for the petitioner, submitted, upon the authority of *Ross's Trust*, 15 Jur. 241; s. c. 1 Eng. Rep. 241—Lord Cranworth, V. C.—which case had recently been followed by Sir J. Romilly, M. R., in *The Matter of Field's Settlement*, 16 Jur. 770; s. c. *post*, that the costs of all parties of this application by the tenant for life, ought to come out of the corpus, the present case being undistinguishable from that of *Ross's Trust*. The parties entitled in remainder had not been served; this was solely with the view to save expense; but if the court was of opinion that it could not make the order asked for in their absence,

<sup>1</sup> 16 Jur. 682; 21 Law J. Rep. (N. S.) Chanc. 875.

then he asked that the petition might stand over, with liberty to serve them.

KINDERSLEY, V. C. I cannot make the order asked for, and should not even if the parties entitled in remainder were here. This is an application not in any way relating to the corpus, but is solely an application for the benefit of the tenant for life. I am aware of the case of *Ross's Trust*, and am aware also that there is a difference of practice in these cases in the different courts, which is to be regretted. I conferred with some of the judges not very long ago with reference to this very matter and there not being an unanimity of opinion as to the practice which ought to prevail, I have come to the determination, until the practice is settled one way or another, of doing what, in my opinion, is fair, and just, and reasonable. I do not think it fair or just that the remainder-men should bear the costs of the applications by the tenants for life. Suppose there were half-a-dozen tenants for life, are the remainder-men to bear the costs of all the applications by all these parties? In my opinion the tenant for life ought to bear the costs of administering the fund, so far as he is concerned, and the remainder-men the costs so far as they are concerned.

*Goren.* If the costs are paid out of the corpus, the tenant for life does bear a proportion of the costs, as he loses the interest.

KINDERSLEY, V. C. That would be quite correct if you could make the tenant for life bear a proportion of the costs of the application by the remainder-men. With reference to the case of *Ross's Trust*, I do not think that the analogy there drawn between the costs of an administration suit, and the costs in such cases as this is a correct one. The costs of an administration suit, which would come out of the fund, would be the costs of the suit up to the time of the fund being ascertained and realized. These would be equivalent to the costs of paying the fund into court under the act, which, being costs affecting the corpus of the fund, are properly payable out of the corpus; but such applications as the present are more analogous to applications by parties entitled to specific funds, after the funds have been carried over to their separate account, in which case the costs of any application by the tenant for life of any such fund, and solely for the benefit of the tenant for life, would be payable out of the income of the tenant for life, and not out of the capital. I think I must follow the same rule in such cases as the present.

*Order accordingly.*

*In re WALKER'S TRUST, ex parte PIPER.<sup>1</sup>*

May 4 and 5, 1852.

*Will, Construction of — Absolute Gift cut down — Period of Division.*

A testator, after giving a life interest in all his property to his wife, directed that at the death of his wife all his property should be sold, and divided equally between his five children, (two sons and three daughters;) and that his executors should, upon dividing the whole of his said property, immediately lay out the whole of the moneys that would belong to his three daughters, as their shares of the said property, in the consols, neither of his said daughters to have power to receive more than the dividends due upon their respective shares; "but in case of the marriage of all or either of his daughters, the child or children of either of them that should outlive their mother or mothers should have his, her, or their mothers' share; and in the case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares and share should be equally divided among the survivors of his aforesaid children or their children." The testator's widow died in 1838, and one of the daughters died in 1849, without having been married:—

*Held*, that the period of division as to the daughters' shares was not the death of the tenant for life, but the deaths of the daughters; and that the gift over upon dying unmarried was not to be restricted to dying unmarried in the lifetime of the tenant for life.

THIS was an appeal from an order of Sir J. L. Knight Bruce, late Vice-Chancellor, made upon petition. William Walker, by his will, dated the 27th December, 1799, after giving a life interest in all his property to his wife, directed that at the death of his wife "all his aforesaid property in the funds or elsewhere, of every description, should be sold, and equally divided between his children, William Walker, Josiah Henry Walker, Ann Kemp, Elizabeth Sarah Walker, and Sarah Mary Walker; and that his executors should, upon dividing the whole of his said property equally as above directed, immediately lay out the whole of the moneys that would belong to his above three daughters, as their shares of the said property, in the 3 $\frac{1}{2}$  per cent. consols, and that neither of them, his aforesaid daughters, should have the power of receiving more than the dividends due upon their respective shares; but in case of the marriage of all or either of his aforesaid daughters, the child or children of either of them, his said daughters, that should outlive their mother or mothers, should have his, her, or their mother's share at their own disposal, both principal and interest; and in case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares and share should be equally divided among the survivors of his aforesaid children or their children; and he appointed and constituted his aforesaid wife, and his son, William Walker, executrix and executor of his will; and he gave and bequeathed unto his executrix and executor all the rest and residue of his said estate and effects, both real and personal. The testator died in 1802, and his widow in 1838. Elizabeth Sarah Walker, one of the daughters, died in May, 1849, without having been married,

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and by her will appointed Joseph Piper, the petitioner, her executor. William Walker, the executor, paid into court, under the Trustees Relief Act, 234*l.* 14*s.*, the amount of Elizabeth Sarah Walker's share of the said testator's property. The petitioner, as the executor of Elizabeth Sarah Walker, claimed to be absolutely entitled to this fund. On the hearing of the petition before Sir J. L. Knight Bruce, V. C., his honor dismissed it, but without costs. From this order the petitioner appealed.

*Shebbeare*, for the appellant, contended that this was, in the first instance, an absolute gift to Elizabeth Sarah Walker, subject only to be reduced to a life estate upon marrying and having a child, and dying in the lifetime of the testator's widow; citing *Ring v. Hardwick*, 2 Beav. 352; *Mayer v. Townsend*, 3 Beav. 443; and *Lassence v. Tierney*, 1 Mac. & G. 551; s. c. 14 Jur. 182; but that Elizabeth Sarah Walker having outlived her mother, which was the period for the division of the property, and having died unmarried, the absolute gift remained, and that her executors were entitled. That the absolute gift could not be cut down by a subsequent clause, "and in case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares and share should be equally divided among the survivors," &c., for that clause was equally applicable to a son's share as to a daughter's; and that if his argument was wrong, this clause would have the effect of cutting down the absolute gift to a son as well as to a daughter, which effect it was clear it could not have. That the Vice-Chancellor, in deciding the case, had remarked upon this latter argument, saying that he was not then called upon to deal with the son's shares; but he submitted, that the same effect must be given to this latter clause with reference to a son's as to a daughter's share. Upon the point that the period for division was the death of the mother he referred to *Brown v. Lord Kenyon*, 3 Mad. 410, and *De Costa v. Keir*, 3 Russ. 360.

*Steele*, for William Walker, contended that the directions in the will were clear, and capable of being performed; that it was perfectly clear that there was an express clause relating exclusively to the shares of the daughters, and that the court would not depart unnecessarily from the fair and ordinary construction of this latter clause of the will, which he contended meant only to relate to the shares of daughters, and that the term "survivors" was satisfied in that way, as there were three daughters. That the death of the mother was not necessarily the time upon which to fasten for the execution of the trust. That the scope and intention of the will was this, that the daughter was to enjoy her share during her life, and at her death, if there was a certain person living, then to that person; but if not, then to other persons.

*Follett and Roxburgh*, for other parties.

*Shebbeare*, in reply.

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LORD CHANCELLOR. There can be no dispute as to the rules which govern this case. The only difficulty is as to the method of applying it to the present will. If there be an absolute gift in the first instance, and then subsequent modifications, which do not exhaust the whole interest, or which do not take effect, then, on the satisfaction of those subsequent modifications, or on the failure of such, the original absolute gift remains so far undisturbed. It is also a general rule, that if you dispose of a fund after a tenancy for life, the period of division would be referable to the death of the tenant for life, if there is no other period at which the division or distribution is ordered to take place. The main question, however, in the present case is, what is the true construction of the will, bearing in mind the above rules? The testator gives the principal to his wife for life, and after her death to his sons and daughters equally. If that clause had stood alone, without doubt each of the children would have taken absolutely. The testator then directs, that after the death of his wife the trustees should divide the whole of his property between his children, and that the shares of his daughters should be invested in the 3l. per cents., and the interest paid to them for life. The death of the tenant for life is not the period of distribution, because it is not until the death of the mother that the daughters are to come into possession of the dividends. "But in case of the marriage of all or either of his aforesaid daughters," then the testator directed, "that the child or children of either of them, his said daughters, that should outlive their mother or mothers should have his, her, or their mothers' shares at their own disposal, both principal and interest;" so that, after the death of a daughter leaving a child or children, there is a regular gift over in its or their favor. The interest of the daughters is restricted to their receipt of the dividends, and that at once shows that the death of the tenant for life was not the period for division, but that it must of necessity apply to the death of the daughters. Then, "in case of the death of one or more of his aforesaid children, dying unmarried, his, her, or their shares or share, he directed, should be equally divided among the survivors of his aforesaid children, or their children."

Now, by this clause, should either of his children die unmarried, there is a gift over to his surviving children and their children; and although that clause refers to the sons as well as the daughters, yet such subsequent modification will not have the effect of cutting down the previous gift, and it is no reason to say that it does not apply to the daughters merely because it cannot apply to the sons. If that clause had stood alone, it would have admitted of two constructions, referable to the death of the testator or the tenant for life; but the latter clause is explained and governed by the preceding clause. Now, that clause creates a gift in favor of the children of the daughters; and it is clear, therefore, that it does not and cannot refer to the death of the mother, but to the death of the daughters themselves. There are no words to show that the daughters were only tenants for life, but no doubt that is the effect of the will; and in a case like the present, where the court can put a natural construction on one clause, and has doubt as to the other, it must take the clear construction as its

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rule for the government of that which is not clear. I am, therefore, of opinion that the share of such of the daughters as should die unmarried is not to be taken as referring only to such as should so die in the lifetime of the tenant for life, but is a restriction taking effect at the deaths of the daughters themselves; and consequently that the share of Elizabeth Sarah Walker survived to such of her brothers and sisters as were living at her death. The order of the court below must therefore be affirmed.

*Appeal dismissed, but without costs.*

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SPARROW v. THE OXFORD, WORCESTER, AND WOLVERHAMPTON RAILWAY COMPANY.<sup>1</sup>

May 1, 3, and 4, 1852.

*Lands Clauses Consolidation Act, 1845, s. 92, Construction of.*

The 92d section of the Lands Clauses Consolidation Act, 1845, which enacts that the owners of a manufactory, part of which is required by a railway company, shall not be called upon to sell part only of the manufactory, in case they are willing and able to sell the whole, is not imperative, but gives the owners, on being served with notice to take a part by the company, an option to require them to purchase the whole or part only of the manufactory, as they shall think best.

Therefore, where the special act of a railway company, after incorporating therein the provisions of the general act, so far as they were not inconsistent with the provisions thereafter contained, went on to enact clauses relating to certain manufactories through which the railway was to pass, and part only of which would be required by the company, which clauses would be superfluous or inconsistent if it were imperative upon the owners to sell, and upon the company to purchase, the whole of the manufactories, it was held that these clauses were not inconsistent with the incorporation of the 92d section of the general act into the special act; and therefore that the company, if they gave notice to take part of any one of the manufactories, were compellable to take the whole, or only the part comprised in the notice, at the option of the owners.

THE bill was filed on the 10th September, 1852, for an injunction to restrain the defendants, the Oxford, Worcester, and Wolverhampton Railway Company, from entering upon, or taking possession of, certain pieces of land mentioned, and required by them, in a notice which they gave on 25th June, 1851, and mentioned in the schedule thereto, and in the defeasance of the bond which they afterwards gave; and from proceeding to take measures to acquire the said pieces of land by compulsory purchase. The plaintiffs were owners of or parties interested in a large tin-plate manufactory at Wolverhampton, which manufactory one of them had purchased from a person of the name of Henderson, about three or four years prior to the filing of the bill, and shortly before the time when the company's act of incorporation (the Oxford, Worcester, and Wolverhampton Railway Deviation Act,

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<sup>1</sup> 16 Jur. 703; 21 Law J. Rep. (N. S.) Chanc. 731.

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11 & 12 Vict. c. 133) passed, which obtained the royal assent on the 14th August, 1848. The land having been left rather in a dilapidated state at the date of the purchase, the plaintiffs soon afterwards improved it, and added some buildings, which buildings were situate upon the line of the projected railway. The company took no steps with reference to the land that they required for this portion of their intended line, until the 25th June, 1851, nearly three years after the royal assent was given to their bill, and nearly, therefore, at the expiration of the time during which they had a power, by compulsory process, of taking land, on giving notice within the time limited for that purpose by the act. They did on the 25th June, 1851, give notice, in the form prescribed by the Lands Clauses Consolidation Act, to the plaintiffs that their railway would pass through the plaintiffs' lands, and that nineteen perches and a half would be required by the company; that it was their intention to take the same, and contract for it; and they thereby offered to contract for the purchase of the plaintiffs' interest therein, and for compensation for damages, &c. The plaintiffs, upon the receipt of that notice from the company delivered a counter-notice, claiming, that if the company took the piece of land which they proposed to take, and which the plaintiffs alleged constituted a small portion only of their manufactory, then they would exercise the right given them by the 92nd section<sup>1</sup> of the Lands Clauses Consolidation Act, 1845, and require the company to take the whole of the manufactory; and they stated themselves to be willing to sell and convey the whole of the manufactory to the company; and they claimed in respect thereof, and for compensation and damages, 60,000*l.*, exclusive of any claim of one Henry Crane in respect of a grant to him by the plaintiffs of a right to use a certain road forming part of the manufactory. The company disputed their obligation to take the whole, and contended that they were entitled to take a part only, which was included in their notice, namely, about nineteen perches. The company, on the 6th August, 1851, caused the portion of the land mentioned in their notice to be valued by a surveyor appointed by two justices of the peace, in pursuance of the provisions of the Lands Clauses Consolidation Act, sect. 85. The purchase money, according to such valuation, was 150*l.*, and the compensation for severance 350*l.*; and the company thereupon paid 500*l.* into the Bank to the account of "Railway Accounts opened during the vacation;" and on the 13th August they delivered to the plaintiffs their bond, with two sureties in the sum of 500*l.*, conditioned for the payment by the company to the plaintiffs of all such purchase money and compensation as should be determined to be payable by the railway company for such land. The company, upon the payment of the 500*l.* into the bank, and the execution of the bond, claimed the right to enter upon the portion of the land comprised in

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<sup>1</sup> The 92d section provides as follows:—"And be it enacted, that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

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their notice and mentioned in their bond, but they had not actually entered when the bill was filed. In this state of things, on the 10th September, 1851, the plaintiffs filed their bill, in substance, for an injunction to restrain the defendants (the company) from proceeding to take a part without taking the whole. An application was made shortly after the bill was filed, to Sir G. Turner, V. C., to obtain an interim injunction, but his honor refused to grant that injunction, assigning, amongst others, as the principal ground for his refusal, that the 92d section of the Lands Clauses Consolidation Act, 1845, did not form part of the company's act, and that it was not, by implication, incorporated with it. See 9 Hare, 441; s. c. 12 Eng. Rep. p. 255. The plaintiff appealed to the lords justices, and the case was argued at considerable length in the month of February, 1852. Their lordships thought at that time that all they had then to decide was, whether a sufficient case was made out to make it expedient that in the meantime, and until the cause could be heard, the defendants should be restrained from doing what they were proposing to do, and that the matter should be left *in statu quo* till the cause was heard; and their lordships, therefore, granted an interim injunction, and at the same time, by an arrangement with the parties, gave them a facility to have the cause heard speedily, both parties agreeing that, instead of examining witnesses, the parties on either side should make what affidavits they thought fit, and that those affidavits should be treated as evidence in the cause, so that the cause might be set down speedily to be heard before their lordships. These preliminaries having been accordingly got through, the cause now came on for hearing. The questions discussed at the hearing, and the arguments of counsel on both sides, are fully considered in the judgment of the court.

*W. P. Wood, Malins, Shapter, and Gray*, appeared for the plaintiffs; and

*Bethell, Rolt, Willes, and J. W. Boville*, for the defendants.

Upon the question of the liability of the company to purchase the whole of the manufactory the following cases were cited:—*Regina v. The London and South-western Railway Company*, 12 Q. B. 775; *Barker v. The North Staffordshire Railway Company*, 2 De G. & S. 55; s. c. 5 Railw. Cas. 401; and *Regina v. The London and Greenwich Railway Company*, 2 G. & D. 444.

LORD CRANWORTH, L. J., after observing that it was unnecessary to call for a reply, delivered his judgment as follows:—The question is, upon this hearing, whether or not the plaintiffs have entitled themselves to the relief which they ask. Now, there were two main questions for consideration—one, a question of fact, and one a question of law. The question of fact was this—whether that which the defendants proposed to take did, within the meaning of the act, constitute a part of the manufactory; and, secondly, the question of law was, supposing the land to constitute part of the manufactory,



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were the plaintiffs enabled to take it without taking the whole manufactory? Now, on the question of fact, that again divides itself into two questions, one of which is, perhaps, rather a question of law than of fact, arising out of the consideration of that which is one of mere fact. What they proposed to take was a certain piece of land inclosed within the wall that surrounded the manufactory, but which, at the time the act passed, was not covered with buildings, though it was within the wall of that which is called the manufactory. Soon after the passing of the act (the plaintiffs having made their purchase just before the act passed) considerable additional buildings were put upon that piece of land, which, or the greater portion of which, was vacant at the time the act passed; and there can be no possible doubt but that these additional buildings constitute part of the manufactory in the strictest sense. But then it was contended, that what was to be looked at was, not the state of matters when the company proceeded to take the land, but the state of the property at the time when they gave the notice; and it was said that at that time those buildings did not exist—that at that time it was vacant ground, within the wall, it is true, of the manufactory, but not having any manufacturing process carried on upon it, and therefore not constituting, within the meaning of the act, part of the manufactory.

Now, we do not think it necessary to decide, as a matter of law, the question, whether you are to regard the state of the property at the time the act passed, or its state at the time when the land was taken by the company. We do not consider it at all necessary to look at or to discuss that question, because we are both most clearly of opinion, without the least difficulty or hesitation, that this was, to all intents and purposes, part of the manufactory at the time the act received the royal assent; and we think so as a jury coming to the conclusion upon the question, what did or did not at that time constitute a part of the manufactory? In questions of this description there may be nice lines of distinction sometimes, as to which it may be difficult to say on which side of the line a particular piece of land or a particular building lies—whether it be outside, so as not to be part of the manufactory, or inside, so as to form part of the manufactory. But we do not feel ourselves driven to any refined discussion about it in this case, because, looking at the model of the premises which has been furnished, and which is taken to be an accurate representation, it appears that there has always been singularly little of vacant space within the wall. I can easily believe what one or two of the witnesses said, namely, that they were always pressed for room, in order to have a place where they might deposit their rubbish and the scoræ that came from the furnaces. The manufactory could not go on without that, any more than it could go on without the furnace itself. It seems to me, and I am sure also to my learned brother, to be perfectly clear, that, in this case, everything included within the wall constitutes part of the manufactory; and indeed, when I say within that wall, as regards a large portion of the manufactory the outer wall of the building is the wall. Sometimes there is a little vacant space between the buildings and the wall, which is meant for

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the purpose of inclosing and surrounding that which evidently and popularly and rationally constitutes the manufactory. Therefore it seems to me to be perfectly immaterial to consider whether the buildings were placed on that vacant space after the act received the royal assent, or whether we are to regard the state of the property after the buildings were erected, or before; because, whether considered in the one light or in the other, they clearly constituted part of the manufactory, within the only rational meaning that could be attributed to that word.

Taking them, then, to constitute part of the manufactory, and that the company gave notice that they would take a piece of land that constituted part of the manufactory, are they or are they not bound to take the whole of the manufactory? Now, that depends upon a question of law, whether or not the 92d section of the Lands Clauses Consolidation Act was or was not expressly or impliedly incorporated into the special act, 11 & 12 Vict. c. 133. Now, Mr. Willes referred to the language of the Lands Clauses Act itself to show — as if that was the test — whether it was incorporated or not. It may be one mode of ascertaining it, but it is not the best mode. The best mode is to look at the special act, and see what the 2d section of the special act says; and that section says, “Be it enacted, that the provisions of the Lands Clauses Consolidation Act shall, so far as the same are applicable, and are not inconsistent with the provisions hereinafter contained, be incorporated with and form part of this act.” Now, it is not disputed that the provisions of the 92d section are applicable, in the sense in which the words are thus used; but what was contended was, that the 92d section was inconsistent with the provisions thereafter contained; and it is upon that point that we have had — the greatest difficulty I will not say, but I will say, the greatest pressure upon our minds; because it appears to have been the opinion of a judge of the highest eminence, and for whom we both, and all the profession, feel the most profound respect — it appears to have been his opinion, that it was not incorporated within the act; therefore we have felt very diffident of the opinion we have formed; and the reason is, because it certainly appears to us pretty clearly to be decided in the contrary way from that which Sir G. Turner, V. C., decided.”

We thought it pretty clear from the beginning, that there was nothing in any of the subsequent provisions inconsistent with the notion of the 92d section being incorporated in that act; and I proceed, therefore, shortly to see what are the grounds on which it was contended here and before the Vice-Chancellor, that the 92d section was not incorporated, because it is inconsistent with the act. Now, I think the argument has always proceeded upon a fallacy. It was assumed that the 92d section was imperative, as my learned brother just now said; it was assumed that the enactment was, that the company must of necessity take the whole of the manufactory; whereas, it only is, that they must only take it if the other party requires it to be taken. But it would have been the height of injustice to enact that in all cases they must take it *in invitum*. The owners of the manufactory might say, in many cases, “It is quite immaterial whe-

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ther you take the whole or not; it is immaterial to us whether you take merely this or the whole;" and then they are not bound to take the rest. It seems to me that the whole argument on the part of the defendants has proceeded on this fallacy; for when one looks at the different arguments which have been deduced from the 12th, 13th, and 14th sections, and considering the 92d section was not, that, under all circumstances, the land must be taken, but only that it must be taken if the owner of the manufactory requires it to be taken, all the difficulty appears to me to vanish. The 13th section, which was mainly relied on, has enactments to this effect. It appears that a gentleman of the name of Crane was the owner of other adjoining land to this manufactory, and by arrangement between the plaintiffs (the owners of this property) and Mr. Crane, for their common convenience, it was arranged that there should be a side line, as it is called — a little private railway — that was to run on for the accommodation of both the plaintiffs' works and Mr. Crane's — that was to run on for a considerable way down to the west, so as to join, not this railway, but the Stour Valley Railway, evidently with a view to the accommodation of those parties who were interested in that side line, or private railway. The 13th section enacts, "that such part of the railway by this act authorized to be made, as shall pass through any of the several plots, pieces, or parcels of land in the parish of Wolverhampton, numbered 159, 160, 161, and 162, on the plan deposited, &c., and so much of the piece of land numbered 158 as is hereinafter defined, (that is, those pieces of land for which this side line, or private railway was to be formed), shall be arched or covered over &c., and such arching or covering shall commence at the centre of the south-eastern pier of the sixth arch of the Birmingham, Wolverhampton, and Stour Valley Railway Viaduct, now erected &c.; and such arching or covering shall be constructed in such manner and of such strength as shall make it sufficient to bear and carry over and upon the same a branch railway, or branch railways, to be worked by horse-power; and in case the owner or owners for the time being, and other parties interested in the said plots, pieces, or parcels of land, and the said company, shall differ as to the manner of constructing, or as to the strength of such arching or covering, the same shall be settled by arbitration, in manner prescribed by the Railways Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration."

Now, the argument was, that that provision is inconsistent with the notion that the company should take the whole of the manufactory. If so, it was said, for what purpose make an enactment about making a railway which will, in truth, be their own railway? They might deal with it as they thought fit. But there are two answers to that — first, the answer I have already hinted at, namely, that, *non constat*, the railway company would be called upon to take the manufactory; it might be that the plaintiffs might choose to retain their manufactory, and then this secures to them the benefit; and, secondly, there is another argument, which completely satisfies this clause, which is this, that this side line, or private railway, was not for the exclusive

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benefit of those parties; certainly one other proprietor, Mr. Crane, was interested. I do not know that I rightly collected whether any other persons were or were not; it is quite immaterial. There is no doubt the party mainly interested was Mr. Crane; therefore the provision in the 13th section was absolutely necessary to secure Mr. Crane; and if there were nobody else interested in the private railway, it was absolutely necessary to secure the interest of the plaintiffs, if they should not call upon the defendants, under the 92d section, to take the whole of the manufactory. Therefore it seems to me that there is nothing whatever inconsistent with the 13th section in supposing that the 92d section was to have its full operation. With regard to the 14th section, it is thereby enacted, "that the owner or owners for the time being of the said several plots, pieces, or parcels of land lastly hereinbefore mentioned, and all other persons interested therein, shall have and enjoy the same powers, rights, privileges, easements, and authorities over, above, and upon the upper surface of the said arching or covering, including the power of making, maintaining, and working the said branch railway or railways, to be worked by horse-power as aforesaid, over and upon the said arching or covering, as the said owner or owners, or other persons, now have and enjoy, in, upon, and over the said several plots, &c.; provided always, that the said owner or owners, or other persons, shall not be at liberty to erect upon the said arching or covering any buildings, without the consent in writing of the said company," &c. Now, it is argued, that what the 14th section shows is this, that it is impossible that the 92d section can be considered as incorporated, and for this reason — when this railway was made, there was a provision in the 14th section of the special act, that no building should be erected upon the new side line or private railway (which included part of that which is now taken from the plaintiffs) without the consent, in writing, of the company. They would be running over this railway; therefore the company were interested in seeing that nothing should be done to damage them. For what purpose, it is said, stipulate for that, if the company itself is to become the proprietors of the manufactory, as an adjunct to which the private railway is to be erected? But the same answer applies. The company may become the proprietors, and then this would become superfluous. Of course, they could not give a consent in writing to themselves; they may do what they think fit with their own property. It may be, however, that they may not become the proprietors; then such stipulation is necessary.

Then, again, Mr. Willes has particularly directed our attention to the 12th section, which, he says, is inconsistent with the notion, that the 92d section was part of this act. The 12th section provides that certain properties, as they are called, numbered respectively, 90, 91, 130, 131, and 140, (being, as I will assume for the present, all of them manufactories — they are all either houses or manufactories, or something that would come within the same class as that which is referred to in sect. 92 of the general act) — the 12th section of the special act enacts, that the company shall, and they are thereby required to purchase all these properties, being all included within

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the line of deviation, but not apparently according to the parliamentary plan that was handed up to us—not properties that would be taken, unless there should be a deviation from the intended line of railway. Then it is said, for what purpose do you enact that these particular manufactories should be taken, when the 92d section would have effected all the required purposes? That is a complete fallacy. The 92d section only gives authority to the owner of a manufactory to insist upon the whole being taken if any part is taken; but this enactment as to the properties numbered 90, 91, 130, 131, and 140, positively stipulates that they shall take the whole of it. It is obvious, on looking at the plan, that a large portion of this must have been taken in some way, to stop the opposition of the owners of the properties, because they cannot all be used for the purpose of the railway. They are all out of the line that was contemplated, though within the line of deviation; and therefore I conclude it was to buy off opposition that this enactment was made. It is sufficient for the purposes of the present object to say, that it is a perfectly different enactment from the 92d section. The 92d section does not say that you shall take every manufactory that is within your line of deviation; but it says, if you take a part of the manufactory, you shall, if the owner wishes it, take the whole of the manufactory. What is enacted by the 12th section is different, namely, with regard to five several manufactories within the line of deviation, but not, probably, in the line that will be touched by the railway, you shall take and pay for those, whether you use them or not. This, therefore, also wholly fails as a reason for inducing us to suppose that the 92d section is inconsistent with the provisions of this act.

Another argument was pressed upon us, but I thought at the time it was unfounded—that these clauses were introduced in consequence of some application that was made to the houses of the legislature—to the house of commons, I think, where the bill was then pending. In the first place, the proof of the fact, I think, wholly fails, as far as the plaintiffs were concerned. It is true, they petitioned the house of commons—so it was stated, and not controverted—against the bill passing, because they thought it would damage their works; and I must say, that it appears to me that there was everything like *bona fides* on the part of the plaintiffs, because they were laying out large sums of money in extending and improving their manufactory. They thought it would materially damage them, and they petitioned against the passing of the bill. They did not appear, it is said, by counsel. Mr. Crane did, and very likely they were in communication with him; and Mr. Crane got this enactment, I dare say, put in with regard to the private railway. That was a benefit to them—they were glad of that; but it is quite clear they did not think it went far enough, or that the act secured them in the way they wanted to be secured, for they petitioned the house of lords, that notwithstanding the introduction of that clause, the bill might never pass into a law.

It is said that they had estopped themselves from this argument, about the 92d section, by representing that the effect of it would be,

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that they could not insist upon the 92d section. I think that was very lamely made out, because, if they did, we cannot, of course, be bound by their view of the law; and it is very strong in their favor on the question of fact, that they never meant to consent; but what they meant to do was, to insist upon the whole of it being taken, if any of it was taken. It seems to me, as far as it has any bearing, that it is in favor of the plaintiffs, rather than against them; it shows that they had their attention alive to the subject—that they had the 92d section in their contemplation, and that they meant to insist upon it, if they could. Now, that being the state of the case, the conclusion at which we have arrived is, that, in point of fact, the property that the railway company has given notice to take was, at the time they gave the notice, part of the manufactory; and that the 92d section entitles the owners of the remaining part of that manufactory to insist upon the whole being taken.

The only remaining question is one which has been raised now at the hearing for the first time, namely, that although they had given a notice, in the ordinary way, that they mean to take the land, the company are now entitled, if they cannot take the land comprised in their notice, to burrow under it, as it were, to make a tunnel, which they say they are able and willing to do, without taking or touching any part of the surface. It is a sufficient answer to that argument to say, that it has been raised since the matter was before us, and since we granted the interim injunction. The notice is a notice which entitles them to take the land. If they are not restrained from proceeding under that notice, they may take the land. Notwithstanding their present argument, we should have found the means of compelling them to abide by an undertaking, if there were any. A great number of arguments in support of this view were urged upon us in this way. It is said, "suppose the manufactory was at the top of a hill, and you were burrowing under it at the distance of 1,000 feet, are you then taking part of the manufactory? I do not feel myself called upon to answer that question; but if I were, I rather believe that you are, on the principle of the maxim, "*Cujus est solum ejus est usque ad inferos.*" Do you mean to say, that if you were an inch below the surface you would not be taking a part of the manufactory? It might all fall down if you undermined any portion of it; and I am rather inclined to think that, however deep below, it would be within that enactment. If that has been a *casus omissus*, I think it ought to be construed in a way most favorable to those who are seeking to defend their property from invasion. I do not, however, think that question arises, because here is a notice to take the land, and upon that notice they are proceeding to take it in the ordinary way. That is virtually what was contemplated when the notice was given; and it is perfectly obvious, from the language of the bond they gave, that that is what they are to do; for they have given a bond, under the 83d section, to enter, and in that bond they have stated thus; that 150*l.* has been assessed as the value for the purchase in fee simple of the messuage, tenements, hereditaments, and the several lands mentioned in the notice, and

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numbered 161; and that 350*l*. has been assessed as the value for severance. It is perfectly obvious that what is meant is, that they are to take that land, and pay 150*l*. for the value of the building, and 350*l*. for the inconvenience occasioned by the severance. That is the way they put it themselves, and I cannot but come to the conclusion that this is a mere afterthought. I do not think that they would have the liberty of doing it, unless they had given a proper notice for the purpose; but it is quite obvious, either they are entitled under this notice to take the land, or to do nothing.

I think, therefore, that the plaintiffs are entitled to the relief they ask. The injunction, therefore, will be made perpetual, in the terms in which it was made before, except with this suggestion, that there should be something, I think, of this sort; the plaintiffs being ready and willing to convey the same, and undertaking to make a good title to the same. I suppose there will be no difficulty about that. Of course, if they have not a good title to the manufactory, they cannot be able and willing to convey it.

KNIGHT BRUCE, L. J. I have a very few words to say after what Lord Cranworth has said. Being very clearly of opinion that the plaintiffs are entitled to a decree, perhaps the few words I am about to say are superfluous. Upon the question of the effect of the 12th, 13th, and 14th sections of the special act, I am of opinion, for the mere reason that it is competent to the plaintiffs, if they should think fit, to sell part and not the whole, that those three sections do not prevent the application or incorporation of the 92d section of the general act in the special act. I am, however, clearly of opinion, upon the undisputed facts of the case, that whether the state of the property at the time when the notice of June last was given, or at the time of the passing of the special act, is regarded for the purpose, that the land which the company require is part of the plaintiffs' manufactory, within the meaning of the 92d section, incorporated, as I think it is, in the special act. Observations were made upon the petitions to the house of commons and upon the petition to the house of lords; I mean upon the allegations in those two petitions. These allegations may or may not have been accurate. Fraud or unfair intention as to either of these petitions is entirely out of the case. It is not pretended that either of them amounted to it. They might by possibility, however, have been so worded as to amount to representations of fact, or of intention, from which, if they had induced a particular line of conduct on the part of those to whom they were made, it might not have been allowable to the plaintiffs to depart. I am of opinion, however, that the case is not brought so high, and that there is no evidence that, by reason of the representations contained in either petition, the company was induced to adopt any line of conduct to its prejudice which otherwise would not have been adopted.

Then with regard to the design, now said to be practicable, and intended, of carrying the railway under the surface of the land in question, in such a manner as not to disturb or interfere with it, one

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sufficient answer to that has been stated, independently of others that might be given, which is this, that the notice of June was a notice to purchase, merely and absolutely, the fee simple of the land specified in it. That notice (whether amounting to a contract or a declaration of intention, forbidden by law to be receded from, is of no importance) had the effect of a contract, and moreover the effect of giving the plaintiffs the right to say their land should not be taken; that their land should not be used; I mean the land mentioned in the contract; unless, if they desired to sell the whole of the manufactory, the defendants should purchase it. From that position the defendants, however desirous to recede, are, in my opinion, not entitled to recede. Substantially, therefore, I agree entirely in the conclusion that the decree must be with the plaintiffs; and I believe that my learned brother also agrees with me that these defendants ought to pay the costs of the suit, including the costs of the original motion for the injunction. The particular form and language of the decree may require a little consideration, because it is not necessary that the particular form and language of the original injunction should be now exactly adhered to. It may be right, but it is not indispensable.

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 BROWNE v. PAULL.<sup>1</sup>

July 18, 1852.

*Sale — Jurisdiction — Discretion.*

Where trustees, having a power of sale, disclaim, the court can exercise the discretion of the trustees, and sell if necessary.

CHARLES HARWOOD, by his will, dated the 7th July, 1841, gave, devised, and bequeathed unto Richard Knight and Thomas Burlton, all his freehold and leasehold estates, upon trust, out of the rents thereof to pay his wife an annuity of 300*l.*, and subject thereto, upon trust to convey, assign, or transfer, all his said freehold, leasehold, and other estate unto and equally between his eight children in manner therein mentioned. In the will was also contained power to the trustees for the time being of that his will, with the consent, in writing, of his said wife, and after her decease, of her, his, or their own authority, to sell or dispose of all or any part of his said freehold, leasehold, or other estate, either by public sale or private contract, and to convey and assign the same, when sold, to the purchaser or purchasers thereof, and to invest the moneys to arise therefrom, and stand possessed thereof upon the trusts therein mentioned, (but not set forth in the abstract.) The trustees disclaimed. The Master had found,

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<sup>1</sup> 16 Jur. 707.



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 Tookey's Trusts.
 

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upon a reference in this suit, that it would be for the benefit of such of the parties as were infants or married women, that the freehold and leasehold estates should be sold. They were accordingly put up for sale in lots, and Henry Grimsdale became the purchaser of one lot. The purchaser now moved to be discharged from his purchase.

*Jolliffe*, in support of the motion, objected that the court had no jurisdiction to direct a sale. The sale merely gives the trustees a discretion, and that discretion will not be exercised by the court. In a similar case of *Calvert v. Godfrey*, 6 Beav. 97, the court declined to authorize a sale. It would change the nature of the property, and might materially affect the interests of the parties.

*Craig and Pownall*, opposed. In *Calvert v. Godfrey* there was no power of sale. Here the court has all the power of the trustees, and can alter the nature of the property. ●

KINDERSLEY, V. C. If the trustees had not disclaimed, and all the competent parties had wished for a sale, would not the court have referred it to the Master to consider whether the sale would be for the benefit of the infants? It would be hard upon the parties if, by reason of the trustees disclaiming, the infants should be injured. If there be a trust for sale, and that sale is for the benefit of the infants, ought the court not to exercise it? How ought the trustees to act if they were asked to sell? Surely they would exercise their discretion as to whether the power should be exercised. I must confess I think there is perfect jurisdiction in the court, under the circumstances, that the testator himself authorized a sale, to elect whether it is for the benefit of the infants that the trustees have declined to accept the trust, and exercise their discretion. This makes it totally different from *Calvert v. Godfrey*.

*Motion refused.*

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 TOOKEY'S TRUSTS.<sup>1</sup>

February 27, March 4, and July 31, 1852.

*Public Company — Costs — Order.*

In this case, a sum of money having been paid into court by a railway company, under the Lands Clauses Consolidation Act, for the purchase of certain pieces of land, some of the parties entitled to it presented their petition for payment out of court.

*Toller*, for the petitioners.

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*Dickinson*, for other parties interested, appeared to consent, but was requested by the court to argue on a question of construction of a will forming part of the title to the land.

KINDERSLEY, V. C., having decided the question, and the order having been made,

*Speed*, for the company, objected to the payment of the costs of this application, or at least of so much of them as were occasioned by the litigation between the parties, according to sect. 80 of the Lands Clauses Consolidation Act; and argued that the length of the briefs and the fees to counsel must have been increased by any arguments being required. It should be left to the Taxing Master to say what extra costs were occasioned.

*Toller* and *Dickinson* contended that the costs were not increased, and must be all paid by the company.

KINDERSLEY, V. C., thought at first that the exception in the Lands Clauses Consolidation Act, sect. 80, of "such costs as are occasioned by litigation between adverse claimants," was not intended to apply to such a case as this, but to a case where an action at law was necessary to decide the rights of the parties, and that the court would decide what costs were so occasioned, and would not leave it to the Taxing Master; but he was informed by the Registrar that the usual form, when costs were directed to be paid according to the act, contained the very same words of exception, and that it was invariably left to the Taxing Master in that form. The order was, therefore, made in the usual form.

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ANDERSON v. NOBLE.<sup>1</sup>

March 11, 1852.

*Injunction — Proceedings at Law.*

The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him: —

*Held*, upon motion by the defendant before answer, that the plaintiff must pay the amount for which judgment had been signed into court within a specified time, or the injunction must be dissolved.

THIS was a motion, on behalf of the defendant, that the plaintiff might be at liberty within three weeks to pay into the Bank of England to the credit of this cause the sum of 3,086*l.* 10*s.*, being the

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 586.

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amount for which judgment had been signed in an action against the plaintiff, and that in default of such payment within the time aforesaid, the injunction issued in this cause might be dissolved. The bill stated that the plaintiff, James Anderson, prior to the year 1841, and for some time afterwards, carried on business as a merchant at Sydney, and in the course of his business had employed the defendant, Robert Noble, who was a merchant at Halifax, as his agent; that the said Robert Noble had claimed a large sum of money to be due to him in respect of such commission, which the plaintiff declined to pay, on the ground that a larger sum had been charged for commission than was fairly due to the defendant; that the defendant had thereupon brought an action against the plaintiff for 2,240*l.*, the sum alleged to be due to him as such agent; that in consequence of the refusal of the defendant to produce his books, papers, &c., the plaintiff was unable to prove, what was the truth, that there was a much smaller sum due to the defendant than was alleged. The bill therefore prayed that an account might be taken, under the direction of the court, of all the dealings and transactions between the plaintiff and the defendant; and that the defendant might be restrained from further prosecuting the said action at law against the plaintiff.

From the affidavit of J. E. Bee, the clerk to the defendant's solicitors, it appeared that the action against the plaintiff was commenced on the 6th of October 1849; that the trial of the said action had been delayed from time to time by the plaintiff, upon various applications for commissions to examine witnesses at San Francisco, most of which had been refused by the judges before whom the applications were made, on the ground that they were intended only for the purpose of delay; that the cause at last came on for trial on the 19th of January 1852, the day on which this bill was filed, when a verdict was given for the defendant, Robert Noble (the plaintiff in the action), for 2,881*l.*; that the costs of the said action had been taxed at the sum of 205*l.* 10*s.*, making, with the sum of 2,881*l.*, a total of 3,086*l.* 10*s.* debt and costs, for which judgment had been signed and execution issued previously to the granting of the injunction in this cause. The affidavit further stated the deponent's belief that the plaintiff's object in instituting this suit and obtaining the injunction was solely to delay the defendant in the recovery of his debt and costs in the action, and that the answer of the defendant, including a statement of all the accounts required by the bill, could not be put in for three or four months, having regard to the course of post between this country and Halifax, where the defendant resided, and the deponent believed that the said debt and costs would be endangered by the continuance of the injunction.

*Cairns*, in support of the motion, contended that the defendant was entitled to have the money paid into court or to have the injunction dissolved. The plaintiff had done all he could to delay the trial of the action, and then, on the very day when a verdict was obtained by the defendant (the plaintiff at law), he filed this bill in order to delay payment until the defendant should put in his answer, and being

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abroad he could not do so for a considerable time. The following cases were cited — *Acton v. Market*, 2 Bro. C. C. 14; *Wesket v. Carnevali*, Ibid. 182, note; *Coglan v. Requeneau*, Ibid.; *Potts v. Butter*, Ibid.

*Roxburgh, contrd.*, submitted that as the injunction had been obtained before the verdict at law, it would only be dissolved in the usual way, after the answer had been put in. The cases cited had reference only to where the injunction was obtained after verdict, and did not apply to this case. There had, moreover, been ample time since the bill was filed for the defendant to put in his answer, and to have come to the court upon the answer to dissolve the injunction, and the defendant might have sent over his invoices and books. There had not even been an affidavit made by the defendant in Halifax to deny the charges in the bill. If that had been done there might have been some ground for the motion, but the only affidavit was made by the solicitor's clerk, who could know nothing of the merits of the case.

KINDERSLEY, V. C. I really have no doubt about the case whatever. In the ordinary course, if a person brings an action at law against another, the defendant has a right to file a bill for an account in this court, and certainly this court has jurisdiction in matters of account where the action is brought to recover that which is the result of an account between the parties, and it is much more convenient to adopt the machinery of a court of equity in taking the account. The party says — "I ask the court to give me an injunction to restrain the proceedings in the action; that is to say, to restrain execution in the action (for that is all the common injunction restrains), until an account has been taken." Moreover, he can apply to stay trial until the defendant has put in his answer, in order that when the trial does take place, the execution will still be restrained. The defendant at law will have the benefit of the answer put in; that is, the discovery which he will get by the putting in of that answer. That is the common course, and then the defendant in equity, wishing to dissolve that common injunction, must put in his answer; and when the answer is a full answer, he must obtain a common order *nisi*, in the first instance, to dissolve the common injunction, and after a certain fixed time, unless cause be shown, he will get that order absolute.

Long ago it was felt, that where the plaintiff in an action at law resided abroad, the defendant at law availed himself of that in order to delay the recovery of what he felt to be a just debt, coming to the court with a bill after verdict (for I will take that course first), after he has taken all the advantage of the defence which he could make at the trial; and then observe, you have no right to move to dissolve this injunction unless you have put in your answer; and as you are abroad, he may say, "I know you cannot put in your answer for some considerable time." The courts early saw the mischief arising from that, and in those cases which have been referred to, all of which appear to me to be cases in which *prima facie*, at least, it was after verdict that the bill was filed, the

courts said just this in substance — “ When you are filing your bill against a plaintiff at law who is resident abroad, and you are asking to substitute service of the subpoena by serving it on the attorney in the action at law, you must have an affidavit of merits; you shall not have a right to substitute service; you are to go through the form of serving him, if you can.” Moreover, the court felt that that was not enough, but that where the defendant at law (the plaintiff in equity) has got the common injunction, the defendant being abroad can apply to this court to have the money brought in or let the injunction be dissolved; and the mischief intended to be cured by that practice, introduced above a century ago, was an obvious mischief, which, no doubt, became very frequent, and which would still exist as a gross abuse of the justice of the country — a gross abuse of the law of this court — were the court not to exercise such a jurisdiction. And that that is the practice still there can be no doubt, although the cases on the subject are only of ancient date. But if there are no modern cases in which the court has exercised its jurisdiction, are there any modern cases in which the court has refused? And what is the use of a reporter multiplying cases upon that which is the well-known A B C practice of the court? In those cases decided by Lord Thurlow and the other judges, I have no doubt that the practice is such, and that it will still be enforced without the slightest hesitation. If such be not the established practice, it is high time that such a practice were introduced, for the want of it would enable the grossest abuse of justice to be perpetrated under the forms and appearance of justice.

Now, then, let us look at the facts in the particular case in question. The bill was filed not after verdict, at least there is nothing to show conclusively that it was after verdict; but the bill was filed on the same day that the trial took place. And now let us see under what circumstances. The action was brought as far back as the 6th of October. The summons was then delivered in the action, and the declaration was delivered on the 3d of November; so that, from the time of the 3d of November 1849, down to the time when the action was tried, on the 19th of January, 1852, during all that time, the plaintiff in equity (the defendant at law) well knew what defence he could make; he perfectly well knew what the case was that he was to meet when he came to the action, and he did undertake the defence of the action. Pleas were put in, issues joined in the month of February, 1850. and then what took place from the time when the issue was joined in the month of February 1850, down to the time of the trial in January, 1852? First of all, the defendant at law obtained a commission to examine witnesses at San Francisco, and that, of course, he was entitled to do. That was obtained on the 13th of April, 1850, and then we find that a copy of the interrogatories was delivered a month afterwards, on the 13th of May; and nearly two months after that again, that is, nearly three months after the order for the commission was obtained, further interrogatories were delivered on the 9th of July, 1850.

In the mean time, the plaintiff at law, on whom the onus of proving every item in the account lay, obtained the commission to exa-

mine witnesses at Halifax ; that is, on the 31st of February, 1850. The interrogatories were handed over, I think, on the same day, but, at all, events, very shortly afterwards, and on that day, an application is made to the defendant to know whether he means to cross-examine the witnesses. On the 4th of June, he writes to say that he declines generally to cross-examine the witnesses. That commission was executed and delivered in October, 1850. Now what was done with the commission to San Francisco, in California, does not appear; or whether the defendant who obtained it abandoned it, I do not know; but on the 10th of January, 1851, that is to say, nine months after obtaining the first commission to San Francisco, he applied for and obtained a second commission to San Francisco, as I understand, to examine another witness there, and the interrogatories were handed over on the 30th of January; and from the 30th of January down to the month of November there is what I may call a total blank as to what was being done with respect to that commission, or whether it was ever attempted to be prosecuted at all. At length, on the 21st of November, 1851, that is, a period of rather more than two years after the declaration was delivered in the action, notice of trial was given. A few days after that notice of trial was given, on the 25th of November, the defendant at law took out a summons—for what? Why, at the end of two years, he took out a summons for leave to inspect Noble's documents; that is, books of account, invoices, and so on, at Halifax, and praying that all proceedings might be stayed in the mean time. The judges, no doubt, felt and saw that all this was for the purpose of delay, and that if he wanted it he should have done it at least two years before, and they refused the application, and, as I think, most justly refused it. But not satisfied with that, on the 28th of November, the defendant at law took out another summons for leave to examine Mr. Noble upon interrogatories, and that was heard on the 6th of December, and the judge there, no doubt, felt that it was for delay, and that if what was asked for had been wanted, it ought to have been applied for before, as there had been ample opportunity, and he refused that application with costs, also. But again, not satisfied with that, the defendant at law took out another summons—to do what? To put off the trial until the return of his commission to San Francisco, the first having been issued on the 13th of April, 1850, and the second on the 10th of January, 1851. Instead of endeavoring to support that summons when it was tendered, on the 1st of December, it was abandoned; so that the defendant at law did either not want to have his commission (for, at all events, he might have got it returned), or he did not wish now to put off the trial on the ground that his commission was not returned from San Francisco. Upon the 9th of December the cause was called on, and it would then have been heard, but from the absence of counsel it was postponed. Then the defendant at law takes an advantage again of that postponement; and he takes out a new summons for a commission to examine Mr. Noble on interrogatories at Halifax. That came on to be heard on the 3d of December, 1851, and it was dismissed with costs. Upon the 9th of January, 1852, notice of trial was

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a second time given. Then, on that same day, the defendant at law (certainly leaving no stone unturned to prevent the thing from being brought to a conclusion) applied to the full court of law, upon a notice of motion, to examine Mr. Noble on interrogatories. The court, on the 12th, when it was heard, refused the application again, as I understand, and expressed its opinion, in which I entirely concur, that all these applications were simply for the purpose of delay. On the 19th the cause came on to be tried, and a verdict was obtained, the plaintiff having proved his case; having proved it by the evidence of witnesses whom the defendant had refused to cross-examine; and a verdict was given for the plaintiff. On that same 19th he applies for leave, on an affidavit made according to the requisitions and the practice of this court — an application made to this court, and granted of course on such an affidavit as contained the requisite statement of facts. So rapid were the defendant's motions there, that on that same day on which the trial took place he filed his bill, he got his affidavit filed, and an office copy of the affidavit, (at least, I presume he did so, otherwise it would have been totally irregular), he got an order of this court, and he got service on the attorney of the plaintiff at law on a subpoena to appear and answer. Then, it is said, if he had got it done on the 20th, that practice which has been referred to would have prevailed, but because he got it done on the very day the verdict was given, it was not after verdict, and therefore the practice is wholly inapplicable. There is no doubt that if a party be sued at law, if he comes and asks this court on bill filed, and gets an injunction to stay proceedings, that will not be dissolved until the coming in of the answer, if properly a matter of account; but if a party can show sufficient equity, then, upon an application to dissolve, the court will do justice. But is a party to say — "I will delay, I will wait; I will put off trial for two years and a half by every possible contrivance, and then I will take every advantage that I can at law, and then, on the very day on which the trial has to come on, I will have my bill ready, and I will file that bill and get an order to substitute service, and in accordance with that order substitute service; and I will then say, the practice does not apply, although twenty-four hours would have made all the difference?" Now if that practice, I say, did not exist at all, it is high time to establish it; but finding it existing, and finding that it is just as applicable to the case before me as to any one of those cases which have been cited, and that it is just as necessary, and feeling that it would be an absolute stain on the justice of the country if the application were not granted, I should have no hesitation in granting it.

But there is more than that. The plaintiff in equity being required by the practice of the court to file an affidavit as to the merits of his case — the bill properly stating, and necessarily stating, for the purpose of sustaining it at all, that the accounts, if properly taken, would show a very different result from that which the verdict at law would show, as to that which the plaintiff was claiming at law; and stating that on the taking of the account, either nothing would be due, or a very small sum, or at all events much less than the amount claimed by the plaintiff, — the

*Forsyth v. Ellice.*

bill, I say, properly stating that, and the plaintiff himself having verified the merits of his case on his bill by affidavit, carefully abstains from saying one word, even on belief, that the whole of the money claimed by the plaintiff, and now established by the verdict, is not due. Not attempting to state that one farthing of that is more than is due; and not only that, but all that he says about any inaccuracy, any impropriety, in the accounts delivered is, that some time either in or previous to 1848, when he had the accounts, and when he was abroad, he says, "I then became aware that there were inaccuracies in the accounts — that a commission on something or other had been charged improperly;" but neither on the bill nor on the affidavit does he attempt to state what the particulars are which lead to the belief that there is that overcharge, or to give me the slightest reason for supposing that there is one single farthing less than that found by the verdict due upon the account. Well, if ever there was a case in which an attempt was made, first in delaying the proceedings at law, and then filing this bill and getting the substituted service, to use the process of the court in order to delay a just demand, it appears to me to be this case.

I have not the smallest hesitation in applying that wholesome practice to the case now before me; and not merely because it would be an abuse to do otherwise, but because it is the order which ought to be made. Let the plaintiff in equity be at liberty within three weeks from this day, to pay into court to the credit of this cause the sum of 3,086*l.* 10*s.*, and in default thereof, let the injunction awarded in this cause for stay of the defendant's proceedings at law be dissolved.

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FORSYTH *v.* ELLICE.<sup>1</sup>

March 12, 1852.

*Witness, Commission to Examine.*

The court having directed a commission to issue for the examination of witnesses upon the certificate of the Master, and that commission having miscarried, by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was directed by the court to issue without any further certificate of the Master.

THIS was a motion, on behalf of the plaintiffs, that they might be at liberty to sue out a renewed or new commission, for the cross-examination of the witness or witnesses examined on the part of the said plaintiffs, under the commission already sued out by them, in pursuance of an order made in these causes bearing date the 27th of May 1851, and that the said renewed or new commission might be directed

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 590.



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*Forsyth v. Ellice.*

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to the same commissioners as were named in the said former commission; and that the defendant Edward Ellice might be at liberty to exhibit interrogatories for the cross-examination of the said witness or witnesses, and to examine any witnesses whom he might desire to examine; or otherwise that the depositions taken under the said original commission might be forthwith published, and the said defendant, Edward Ellice, be estopped from taking any objection to the said depositions on the ground of the said commissioners having refused or omitted to receive interrogatories on the part of the said defendant for the cross examination of the said witness or witnesses.

It appeared from an affidavit in support of the motion, by the solicitor for the plaintiffs, that by the decree made on the hearing of these causes dated the 11th of July 1845, it was referred to the Master to inquire and state to the court whether any debts or debt, or sum of money, for or to which the firm of Sir Alexander M'Kenzie & Co. was liable, had at any and what time since the 21st of March, 1821, been paid or become vested in the defendant Edward Ellice. That in pursuance of such decree a state of facts and claim was carried into the office of the Master in respect of a debt due from the firm of Sir Alexander M'Kenzie & Co. to Messrs. M'Gillivray & Co., and claimed by the said defendant to be vested in him; and that a counter state of facts, on the part of the plaintiffs in the said cause, with respect to the said debt, was also carried into the office. That by a certificate of the Master, dated the 29th of March, 1851, he certified that it appeared to him to be necessary that a commission should issue directed to commissioners in Canada, to take the depositions of witnesses on the part of the plaintiffs. That by an order made on the 27th of May 1851, upon the petition of the plaintiffs, it was ordered that the petitioners should be at liberty to sue out a commission for the examination of witnesses in Canada, and that a commission was issued accordingly, directed to commissioners, on the part of the plaintiffs and the defendant, which was forwarded to Montreal, in Canada, in the month of September last. That such commission had been returned, with the depositions under the seal of the commissioners. That a warrant was taken out to show cause why publication should not pass, and that the solicitor for the defendant, Edward Ellice, objected to such publication, on the ground of some irregularity having occurred in the execution of the commission, whereby he had been deprived of the opportunity of cross-examining the plaintiffs' witnesses. That in consequence of such irregularity the plaintiffs' solicitor applied to the defendant's solicitor to consent to an order for the plaintiffs to be at liberty to sue out a renewed or new commission to take the cross-examination which, under the circumstances, had not been taken under the original commission, but the defendant's solicitor declined to consent to any further commission being issued.

*Glasse and Dickinson*, in support of the motion, contended that this order ought to be made by the court and not by the Master, and that it was necessary, in consequence of the irregularity in the first commission, that a renewed or new commission should issue;

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Fornyth v. Ellice.

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and cited *Handley v. Billinge*, 1 Sim. 511; *Campbell v. Scougal*, 19 Ves. 552; *Marquis Cholmondeley v. Lord Clinton*, 2 Mer. 81; *Dobson v. Land*, 7 Hare, 296; s. c. 18 Law J. Rep. (N. S.) Chanc. 240.

*Bacon* and *Brett* opposed the motion, on the ground that it was for the Master to direct a new commission to issue, if he thought it desirable, and not the court, and that it had never been the practice of the court to issue a second commission without the Master's certificate.

KINDERSLEY, V. C. The question here is not, as in some of the cases cited, whether a commission should issue, but whether, a commission having issued on the authority of the Master's certificate, a cross-examination can be issued upon motion to the court without a reference to the Master. The Master only asserts that there ought to be a commission; but it is the court that orders the commission to issue, and the court having ordered the commission, and a miscarriage having taken place, the question arises whether the court is now to deal with it.

On this motion there has been a transposition of the two alternatives; in fact, the cart is placed before the horse. The application should have been to publish the depositions, or if the court, by reason of a miscarriage having taken place, should think that the depositions should not be published, then to direct in the alternative that a new commission should issue. In the case of *Handley v. Billinge* there was an actual certificate by the clerks in court, as to the publication of the evidence of witnesses examined under a commission; it was in these words:—

"We humbly certify that in the case of the examination of witnesses after a decree, such witnesses having been examined either by commission or before the examiner, the publication of the depositions is passed by order of the court, unless the publication be passed by the respective clerks in court signing a consent to pass publication in the six clerks rule-book; but in the examination of the witness by the Master personally, a circumstance rarely occurring, the publication is by warrant granted by the Master."

If that were the simple case here, without any miscarriage of the commission, and without any dispute about its having been duly returned, then this court, not the Master, would be the tribunal to apply to; and I think that upon the proper principle it is not the Master's commission, he only certifies that it is necessary to have a commission, and the court says, "Let the witnesses be examined," so that in fact this court is the proper tribunal to say when and how the commission is to go. That is plain on a simple case where there is no question about miscarriage. I think this would have been a simple application to pass publication, but the parties went before the Master on a warrant, to ask him to pass publication. The question raised was, whether it ought to pass or not; but nothing was determined by the Master; and then the parties come here, the plaintiff's solicitor finding out that he has been wrong in going to the Master,

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Hyder v. Coleman.

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and that he ought to have come here in the first instance. I think that the alternative should have been put in a different way, but I do not think that that fault vitiates the notice of motion. The plaintiffs do not wish for a new commission, but it is acknowledged by the plaintiffs that there has been a miscarriage, and they ask the court to let the defendant have a new commission to cross-examine their witnesses; but if that order is not made, and if the defendant does not choose to have a new commission, then that publication may pass under the commission, which has been to some extent executed. It is said, as to the first alternative, "How can you come and ask for a commission when there is no certificate of the Master?" No doubt this court will not issue out a commission except on the certificate of the Master, but when the court has directed a commission to issue on the certificate of the Master, and when the defendant says publication ought not to pass because of miscarriage, in consequence of his not having been able to cross-examine the witnesses, then it is not for the Master to determine whether the cross-examination requires a commission, but it is for this court to determine whether, by reason of the miscarriage, there ought to be a renewal of the commission to set right what may have occurred upon that miscarriage. I think the defendant is at liberty to choose whether he will have a new commission, or whether publication shall pass.

Declare, the court being of opinion that the defendant should elect which to take; and the defendant electing to take a new commission to the same commissioners, direct the plaintiffs to issue a new commission, the plaintiffs not to examine new witnesses, but to be at liberty to cross-examine witnesses examined by the defendant. Costs to be costs in the cause.

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HYDER v. COLEMAN.<sup>1</sup>

April 19, 1852.

*Costs—Unopposed Petition—Irrelevant Matter.*

An unopposed petition contained statements which were immaterial to the prayer. The court inserted in the order a direction to the taxing Master, in taxing the costs, to have regard to such statements.

A PETITION was presented in this cause praying for an order that the Master might sell a certain property by private contract.

The petition was unopposed.

Steere, for the petition.

PARKER, V. C., said that, on reading over the petition, he perceived

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 592.

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*Ex parte The Bishop of Hereford.*

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that it contained several statements which were quite immaterial to the prayer of the petition. He could not pass this over; and he should, therefore, insert in the order a direction to the taxing Master, in taxing the costs, to have reference to the statements contained in the petition, and to allow costs for such of them only as the petition required.

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*Ex Parte THE BISHOP OF HEREFORD.*<sup>1</sup>

February 20, 1852.

*Copyhold Enfranchisement Act—Costs of Petition for Investment.*

A bishop, lord of a manor, enfranchised certain copyhold lands held of the manor under the Copyhold Enfranchisement Act, and the consideration money was paid into court. A petition was presented by the bishop for the investment of the money:—

*Held*, that the copyhold commissioners had a right to appear at the hearing of the petition, and that their costs of the petition and those of the bishop were payable out of the consideration money.

THE Bishop of Hereford, as lord of a manor, with the consent of the copyhold commissioners, enfranchised certain copyhold hereditaments held of the manor, and the money received in respect thereof was paid into court under the Copyhold Enfranchisement Act.

A petition was presented by the Bishop for the payment of the costs of, and incident to, the petition out of the fund in court, and for the investment of the remainder, as directed by the act, and for the payment of the dividends. The copyhold commissioners were served with the petition and appeared. The petition came on to be heard, and an order was made according to the prayer of the petition.

The Registrar having declined to draw up the order, on the ground that Sir J. L. Knight Bruce had decided that the commissioners ought not to have been served with the petition, and that the costs were not payable out of the fund, the matter was now again brought before the court.

By the 4 & 5 Vict. c. 35. s. 56, it was enacted that a lord of a manor, whatever might be his estate or interest therein, with the consent of the commissioners under the act, might enfranchise lands holden of the manor for any sum, &c.

The 58th and 69th sections of the act relate to the expenses of the enfranchisement.

By the 73d section, it is enacted "that all moneys paid for enfranchisement from the lord's right, where such lord shall be only entitled for a limited estate, shall, if the same exceed 200*l.*, be paid into the Bank of England in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account

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<sup>1</sup> 21 Law J. Rep. (n. s.) Chanc. 608.

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 Heath v. Chapman.
 

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there, *ex parte* the copyhold commissioners, pursuant, &c., and shall, when paid in, therein remain until the same shall, by order of that court, made upon the petition of the party who would have been entitled to the rents and profits of the manor had no such enfranchisement been made, be applied in the discharge of incumbrances affecting the manor, or in the purchase of lands to be settled to the like uses; and, in the meantime, the same money may, by order of the said court, upon application thereto, be invested by the said Accountant-General, in his name, in the purchase of 3*l.* per cent. consolidated bank annuities, or 3*l.* per cent. reduced annuities, the dividends in the meantime to be paid to the person who would have been entitled to the rents and profits of the manor if no enfranchisement had been made."

*Willcock*, for the petition.

*Prendergast*, for the copyhold commissioners.

PARKER, V. C., said that he had communicated with Lord Justice Knight Bruce, and that he should decide that service of the petition on the commissioners was necessary, and that they had a right to appear on the hearing. As to costs, the question was one of more difficulty, and, but for a decision of the Vice-Chancellor Knight Bruce, (*Ex parte the Archbishop of Canterbury*), who granted the costs of the petitioner out of the fund, he should have doubted his jurisdiction to make any order as to the costs of the petitioner or the commissioners. He should, however, follow that precedent; and, as the commissioners had a right to appear at the hearing of the petition, he thought that the proper order on the present occasion would be, that the petitioner should pay the costs of the commissioners, and add them to his own, and take such costs out of the fund.

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#### HEATH v. CHAPMAN.<sup>1</sup>

March 16, 1852

#### *Witness — Foreign Commission — Expenses.*

A testator gave the residue of his property to be held in deposit for the purpose of inquiring whether there were any relations of his blood living, and if so, the said residue was to be divided equally among them. Upon a reference to the Master to make inquiries in conformity with the above residuary bequest, the Master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next of kin. The court, upon the application of the executors, made an order for a foreign commission, and also direct-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 614.

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Heath v. Chapman.

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ed what sum should be allowed out of the testator's property for the expenses of the commission.

THIS suit was instituted for the administration of the estate of Domenico Dragonetti, a professor of music, who was a native of Venice, but had died domiciled in England, and by his will, after making various specific bequests and legacies, gave the residue of his property in the following terms:—"And as respects the residue of all the money and securities for money belonging to me at my bankers, in whatever bank or place the same may be, I desire that after all obligations, gifts, and engagements shall have been satisfied, the above-mentioned residue be held in deposit for the purpose of inquiring whether there be any relation of my blood living, and if such be found, it is my will that all the said residue be given to my next of kin; and if there should be living several of my relations in equal degree of consanguinity, I desire that the said residue above alluded to be divided in equal shares for them and among them." In case no persons could be found to answer the above description, the testator gave the residue of his property for the benefit of various churches in Italy. Upon a decree made in the cause, in December, 1850, it was referred to the Master to inquire and state who, according to the laws of this country, would have been entitled at the testator's decease to his personal estate, and who were his next of kin or their legal personal representatives.

The Master, by his report, dated the 28th of January, 1852, stated that one Girolamo Zener, resident at Venice, had made a claim, alleging himself to be the representative of the next of kin living at the time of the decease of the testator, and had carried in a state of facts in support of his claim, and by which, very material facts relating to the family of the testator appeared.

The report of the Master, after setting forth the effect of the evidence before him, and the names of the witnesses, all of whom resided at Venice, stated that it appearing that no further evidence could be obtained, showing who were the next of kin of the testator, unless the evidence above referred to should be obtained, and it appearing that the decree could not be further prosecuted without such further evidence, the Master certified that it was necessary that a commission should issue to take evidence in Venice and its neighborhood in reference to the inquiries.

A motion was now made that in pursuance of the certificate of the Master, a commission might issue to take evidence in Venice and its neighborhood, in reference to the inquiries directed by the decree, and that all the costs, charges, and expenses incident thereto might be borne by the estate of the said D. Dragonetti, and that if necessary it might be referred to the Master to ascertain what would be a proper sum to be allowed for the commission, and that such sum might be raised out of the money forming part of the estate of the testator.

*Stuart* and *Elderton* appeared for the plaintiffs, and submitted that this commission ought to be granted, since it was impossible

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Heath v. Chapman.

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otherwise for the trustees to carry out the trusts of the will. It was also urged that the expenses of the commission should be paid out of the testator's estate, and money for the purpose should be advanced, since the claimant was a person in humble life, and was quite unable to provide the expense himself.

*James* appeared for the Attorney-General, and submitted that it was unnecessary to go to the expense of a commission, as it would be quite sufficient to obtain evidence by communicating with persons in Italy. There had already been a considerable outlay in searching for the testator's relations, and this would materially diminish the property which, in case of there being no next of kin found, would go to a charity.

**KINDERSLEY, V. C.** This was an application for a commission to examine witnesses, at Venice, in a cause for the administration of the estate of a person who was by birth an Italian, and a native of Venice, Domenico Dragonetti. He was a musical professor in this country, and had amassed a certain amount of personal property, which he has given first to his next of kin, and in his will there is this clause — (his honor here read the residuary clause in the testator's will). — So the testator intimates very distinctly that he is uncertain whether he has even any, or how many, of his blood living; at all events entirely uncertain whether, if there be any, they will be capable of being ascertained, and quite uncertain as to what relatives they may be; and he clearly directs that the residue of his property shall be held in deposit for the purpose of inquiring whether there be such relatives of his blood. Now, it appears that the decree having made a reference to the Master to inquire what relations he had, the inquiry was in this form: He was to inquire and state to the court, who, according to the laws in force in the country in which he should find the testator Domenico Dragonetti to have been domiciled, for regulating the succession of estates and effects of persons dying intestate, would have been entitled to his personal estate, — who was or were next of kin to the said testator at the time of his death, according to the laws in force in this country for the distribution of intestates' assets, and he was to inquire whether such person or persons were dead, and who were their representatives. So that the purpose of the inquiry was to ascertain what the testator himself had pointed out that it was necessary to ascertain, and he was unable to give any information by his will upon the subject.

It seems that the Master, in the course of last year, certified that a commission was necessary for the purpose of prosecuting this inquiry, and Lord Cranworth made an order for a commission; and upon appeal to the Lord Chancellor he reversed that decision and discharged the order, considering that it was not regular to grant the order in the then state of circumstances. It did not very distinctly appear what the Lord Chancellor's grounds were, but I think I can see quite ground enough for his having thought that in that state of things there could not be a commission. At that time there was nothing

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*Heath v. Chapman.*

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before the Master but a decree containing the reference for inquiry. Now, under a decree directing an inquiry as to certain matters of fact, the Master cannot merely upon that receive evidence upon anything. He must have before him some state of facts, or charge, or claim, brought in by somebody, in support of which, or in opposition to which, he may receive evidence. There must be something before the Master containing an allegation of something, for the Master to receive evidence at all; and that not only as to evidence under a commission directed to persons in a foreign country, but even evidence with reference to persons in this country he cannot receive, until there is some allegation before him upon which he can proceed. There seems to have been no such allegation, no such state of facts, charge, or claim, before the Master; but it seems to have been considered that he was directed to inquire whether there was to be a commission, not for the purpose of taking evidence, but for the purpose of inquiry. Now, that alone, I think, would be a ground why it would not be regular in that state of things to grant a commission as the matter then stood in July last. Another ground seems to have been, that there was no particularity as to there being any witnesses who might be able to give any evidence under the commission. I believe another ground existed, though it did not appear very distinctly, that the commission was of a roving kind, that is to say, it was not addressed to any particular locality, but, I believe, addressed to Italy, generally, which the Lord Chancellor very properly considered was too roving. There was quite sufficient ground in that state of things for the Lord Chancellor to have thought there ought not to be a commission.

The state of things now, when this application is made, is very different from what it was at that time. It appears, that since the proceedings in July last, a Venetian, a person at least residing in or near Venice, of the name of Girolamo Zener, has brought before the Master a state of facts and charge, claiming that he is the next of kin, or, at least, one of the next of kin or blood-relations of the testator, and in support of that state of facts, produced before the Master various documents sent over from Venice to this country, which, although they do not establish, perhaps, in the shape of distinct evidence, whether this Girolamo Zener is positively the next of kin, or one of the next of kin, nor establish who are the next of kin distinctly and conclusively, certainly do go to show that there are a number of persons whose names are distinctly set forth, resident in or near Venice, who are capable of giving at least some evidence and information upon the subject of the testator's family, and evidence which may go either to substantiate or defeat the claim of Girolamo Zener, who is claiming to be next of kin; and not only so, but will also probably tend, whatever may be the result of that particular claim, to do what the testator desired to have done, to have the inquiry made as to who are his blood-relations, whether there be any such, and who they are. There is, therefore, now, in the existing state of things, no positive irregularity in granting the commission. The Master certifies, very much indeed in detail, the grounds upon which he considers a commission should go; and it appears clear that the commission would be quite



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right if it were applied for by Girolamo Zener, the claimant, for the purpose of his claim. The plaintiffs are the representatives of the testator, and they have no interest either in defeating or supporting the claim of Girolamo Zener, or anybody else; but they have a positive duty imposed upon them to do all they can to ascertain whether there are any blood-relations, or any next of kin, and who they are. That duty is imposed upon them by the testator's will, and this court would be very reluctant to adopt a course, the effect of which must be that this testator's property must remain in this court, I do not know till when. I do not know what steps are to be taken, except in some way as here proposed. For the purpose of this court really and truly adjudicating upon the rights of the persons who are entitled to the property, it is necessary to find out who they are. I have said there would be no irregularity in now granting a commission, if it were upon the application of Girolamo Zener, the claimant himself; nor would there be any irregularity in granting the commission upon the application of the plaintiffs themselves. Supposing the plaintiffs to be in a situation in which they had either an interest or a duty to oppose the claim, they might have a commission for the purpose of examining witnesses to oppose this man's claim; but their position is such that their duty is only to oppose in the sense of taking care that the evidence is distinctly and fully brought out to show whether the man is or is not next of kin, or who may be next of kin. There being no irregularity in granting a commission, what presses upon my mind is this:—that it appears to me that the granting of a commission, irrespective of its being a mode of determining whether this man, who now claims, is or is not the next of kin;—irrespective of that, it appears to me to be a mode and machinery by which the court can best, in all probability, work out what the testator directed to have done, that is, to have inquiries instituted, not merely a roving inquiry getting somebody to pick up all the gossip he can get in Venice and its neighborhood, but by information derived from persons subjected to the test of examination under the solemnity of an oath. It appears to me I ought to grant a commission, first, because it is not irregular to do so, and it may be very serviceable with a view to the specific claim now pending before the Master, and also as a very convenient and a very desirable mode of working out what the testator desired should be worked out, and what this court would be very desirous to work out, and which it is the duty of this court for this purpose to work out. For these reasons, I think it right to grant this commission.

It is true, as was urged by the counsel for the Attorney-General, it may be that the result of this commission may be to defeat the claimant Girolamo Zener. It may defeat his claim, and if it were merely to result in that, the observation of counsel would be very just—“Why should the testator's estate be wasted by an individual claim which may turn out to be no claim at all. But being satisfied as I am that the tendency at least, if not the certain result, of the commission, will be to get inquiries effectively prosecuted upon the subject of the testator's relations; for that reason it appears to me that it will

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*In re Stables.*

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not be a waste of the testator's estate, even though the particular claim should fail, whatever should be the result of the claim.

Then comes the question, what ought to be done with reference to that part of the application which asks that a certain sum out of the testator's estate, now in court, should be delivered out for the purpose of working this commission? What is asked is a reference to the Master to ascertain what would be a proper sum; but it has occurred to me that, without the expense of going back to the Master, I could be satisfied, by reasonable evidence of some persons competent to judge of the matter, of what would be required upon an economical scale fairly to work the commission without extravagance. For that purpose I should like to know how it is intended to work the commission. Its effectiveness would depend very much upon the mode in which, and the persons by whom, it is worked.

Upon a subsequent application to the court, an affidavit was produced, showing in what manner it was proposed to work the commission, and what sum would be required for the purpose.

KINDERSLEY, V. C., made an order in conformity with the affidavit, and directed the money to be raised and paid out of the testator's estate.

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*In re STABLES.*<sup>1</sup>

July 3, 1852.

*Infant—Allowance to Parents out of Infant's Income.*

The Court will not give a direct benefit out of an infant's income to his father.

A scheme by which an infant (whose father was living) was to be article to a solicitor, and to live with an uncle residing in the same place, was approved of by the court; and the uncle was appointed to act in the nature of a guardian to the infant, and to have an allowance out of his income. An application that an allowance might be made to the father, who lived at a distance, and was in very narrow circumstances, was refused.

THIS was a petition presented by an infant.

This petition stated that the infant, then seventeen years of age, was absolutely entitled to property which produced about 220*l.* a year, that it was proposed that he should be at once article to a solicitor named in the petition, who was willing to take him, and that he should, during his minority, reside with an uncle who lived in the same place as the solicitor.

The petition then contained these statements:—The father of the infant was living. He was a clergyman of the Church of England, but had no preferment, and not entitled to any property whatever, and

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 620.

his only means of subsistence were the emoluments derived from teaching a village school, which amounted to no more than 20*l.* a year. The father's residence was at a distance from the town where it was proposed the infant should be articulated.

The petition then stated that it was proposed that the infant's uncle should be appointed to act in the nature of a guardian to him, and that an allowance of 90*l.* a year should be paid to him for the infant's benefit, and that the father was willing that the above arrangement should be carried out, and that he did not wish to interfere with the infant in any way. The petition then stated that, under the circumstances of the case, it was proposed that an allowance of 20*l.* a year should be paid to the father out of the infant's income not required for his maintenance. The petition prayed that the above scheme might be carried out, and that the uncle might be appointed to act in the nature of a guardian to the infant, and that the above-mentioned allowance should be paid to him for the infant's benefit, and that 20*l.* a year might be paid to the father.

*B. L. Chapman*, for the petition, asked that the above-mentioned allowance of 20*l.* a year should be paid to the father out of the income of the infant on the authority of the cases of *Heysham v. Heysham*, 1 Cox, 179, and *Allen v. Coster*, 1 Beav. 202; s. c. 9 Law J. Rep. (N. S.) Chanc. 131. In *Heysham v. Heysham*, the father of a female infant was dead, and her mother was living. The court had passed over the mother and appointed another person to be the guardian of the infant. An order was made that 130*l.* should be paid to the guardian for the maintenance of the infant, and that 120*l.*, part of the infant's income, should be paid directly to the mother. In *Allen v. Coster* the principle of making an allowance to a parent directly, where the guardianship of the infant was in other hands, was recognized by Lord Langdale; though, as it was there contended that there was a gift to the father of the income, the point was not expressly decided.

PARKER, V. C., said, that in the case of *Heysham v. Heysham* a benefit was given to the mother. A father was bound to maintain his children, and he thought that he could not make an order giving him a direct benefit out of the income of the infant's property. In *Allen v. Coster* there was a sort of compromise. He must decline to make any order as to that part of the prayer of the petition which asked for an allowance to the father.

WEBB v. WOOLLS.<sup>1</sup>

March 27 and April 26, 1852.

*Will—Precatory Words—Absolute Bequest—Trust and Confidence.*

A testator, by his will, bequeathed all his property of whatsoever description to his wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she would dispose of the same to and for the joint benefit of herself and his children:—

*Held*, that the widow of the testator was entitled to have the entire residuary property transferred and paid to her for her own use and benefit.

This was a claim filed by the plaintiff, Jane Webb, who was the executrix appointed under the will of her husband, Richard Webb, against Edward Woolls, who was the executor appointed by the will jointly with the plaintiff, and against the children of the testator, for the purpose of having an account taken of the estate and effects of the testator which had been received by the defendant, E. Woolls.

The claim now came on upon further directions, and a question was raised as to the construction of the will of R. Webb, dated the 4th of June, 1836, which was in the following words:—“This is the last will and testament of me, Richard Webb, miller. All my property of whatsoever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, I give and bequeathe the same and every part thereof unto my dear wife Jane, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she will dispose of the same for the joint benefit of herself and my children. And I hereby appoint my said wife and my friend Edward Woolls executrix and executor of this my will and testament, hereby revoking all previous testamentary papers at any time heretofore made by me.”

The question was, whether the widow of the testator was entitled absolutely to the property bequeathed by the above will, or whether a trust was created for the benefit of her children.

*Shapter* appeared for the plaintiff.

*Beavan*, for the defendant, Edward Woolls; and

*Murray*, for the other defendants.

Cases cited:—*Crockett v. Crockett*, 1 Hare, 451; 5 Hare, 326; 2 Ph. 553; s. c. 11 Law J. Rep. (N. S.) Chanc. 279; 16 Law J. Rep. (N. S.) Chanc. 214; *Woods v. Woods*, 1 Myl. & Cr. 401; s. c. 17 Law J. Rep. (N. S.) Chanc. 426; *Raikes v. Ward*, 1 Hare, 445; s. c. 11

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 625.

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 Webb v. Woolla.
 

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Law J. Rep. (N. S.) Chanc. 276; *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Robinson v. Tickell*, 8 Ves. 142; *Wood v. Wood*, 3 Hare, 65.

KINDERSLEY, V. C. This is one of a class of cases which are extremely difficult to arrive at a conclusion upon. It is one of those cases in which a gift being made to the parent, by the words of the will, a question is raised as to whether a trust is created for the benefit of the children or family of that legatee. In the present case the words of the will are short, and certainly very distinct; and I have not been able to find any case, or rather, any decided case, which appears to me entirely to govern the present. The words of the will are these, "This is the last will and testament of me, Richard Webb. All my property of whatsoever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, I give and bequeathe the same and every part thereof unto my dear wife Jane, her executors, administrators and assigns to and for her and their own use and benefit." Now, if it stopped there, of course there would be no question, because it is not only a gift to the wife, her executors, administrators and assigns, but it goes on to declare that the party or parties who are to benefit by that gift are the wife, her executors, administrators, and assigns. It is a gift to her of the legal interest, and an express gift to her of the whole beneficial interest. If she is alive when the property is realized it would go to her; if she had died before the property was realized, it would go to her executors and administrators for their own use and benefit, of course, as part of her estate; and if she had made an assignment of it, then to her assigns for the use and benefit of those assigns. And nothing can be more express and distinct than the testator's intention, that the whole beneficial interest should belong, in fact, to the wife, or to those claiming under her, either as her executors, or administrators, or as her assigns. And, then, I may observe that if that be so, if in the words which follow there is any thing that imports that there is to be a benefit for some parties other than the wife, her executors, administrators and assigns, such words would necessarily be in direct contradiction to the language which I have just read. Now the words which follow are these: "Upon the fullest trust and confidence reposed in her, that she will dispose of the same for the joint benefit of herself and my children; and I hereby appoint my said wife, and my friend Edward Woolls, of Uxbridge, executrix and executor of this my last will and testament, hereby revoking all previous testamentary papers heretofore made by me." That is the whole of the will. Now, the question is, whether that last clause, — "upon the fullest trust and confidence reposed in her, that she shall dispose of the same for the joint benefit of herself and my children," — creates a trust for the benefit of the widow and her children, contradicting an express direction in a prior part of the will, that the gift is to the wife for her own use and benefit.

Now, one rule of construction, which is quite elementary, appears to me to be applicable to this case, which is this, — that if there be two clauses or sentences, or branches of a sentence, in a will capable

of two different constructions, according to one of which constructions the two sentences or branches of a sentence would contradict each other, but according to the other construction, the two clauses or sentences, or branches of a sentence, would be in accordance with each other, carrying no contradiction with them, you should adopt that construction which would make the two clauses agree, instead of putting a construction upon them which would make them contradict each other. Now, here we have not only two sentences, but two parts of the same sentence. If I am to put upon the latter branch of the sentence a construction the effect of which would be to create a trust, that is, a trust which might be enforced in this court for the benefit of the children as well as the wife, — if, I say, I put that construction, I make these two branches of the same sentence directly contradict each other. Now, is there any construction which I can put on that last branch which will prevent that contradiction? I think there is. I think I may fairly put this construction on the latter clause, — that the latter clause was intended, not for the purpose of creating a trust for the benefit of the wife and children, which the children could enforce against the wife, but simply for the purpose of declaring that in giving all his property to his wife for her own use and benefit, making her the absolute mistress of the property, and of the mode of disposing of it, all he meant to do by the latter clause was to express that he reposes in his wife full confidence that she will dispose of it for the joint benefit of herself and her children, without intending to impose upon her the obligation to do so.

Now, in looking through all the cases (and I think I have examined them all), those that were cited, and those that were subsequently handed up, — and there is a note of several others in those, — I have not been able to find any case which is in all respects the same as this. The nearest case to it I think, or one of the nearest cases to it, is that of *Crockett v. Crockett* in 1 Hare, and again in another stage of the cause in 5 Hare, and then upon appeal, in 2 Ph. Now, in that case the language of the will was this, “My desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife, Caroline Crockett:” of course, if it stopped there, there would be no doubt, since giving the property to be at her disposal would be to give it to herself absolutely. Then it goes on to say, “for herself and her children, in the event of any unforeseen accident happening to myself, which God forbid, and I recommend the arrangement of all my affairs to my friend J. Gore.” Now, the wide difference between that case and the present is this, that there is not in *Crockett v. Crockett* as in this case, first of all a gift to the wife, her executors, administrators and assigns, to and for her and their own use and benefit; there is simply a direction that the property shall be at the disposal of the wife for herself and children. In that case the Vice-Chancellor, Wigram, held that the wife and children took as joint tenants, and one of the children, who had attained twenty-one, having applied for his share on that footing, Vice-Chancellor Wigram gave him an equal share with the wife and the other children. When it came by way of appeal before Lord Cottenham,

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 Webb v. Woolls.
 

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Lord Cottenham reversed that decision. He reversed the declaration which Vice-Chancellor Wigram had made, — that the wife and the children took as joint tenants, and reversed the direction to pay an equal share to the child who had come of age, but he declined to decide what the rights of the parties were. He said that no doubt the wife had a personal interest in the fund, and that as between herself and her children she was, as he said, either a trustee with a large discretion as to the application of the fund, or she had a power in favor of her children, subject to a life interest in herself. And having stated that one or other of those two was the right construction, his lordship there left it, and I cannot help thinking, left it there on account of the enormous difficulty in saying which of those two was the right construction. His lordship gave reasons why he thought it not necessary to decide it, but the fund was in consequence left in court, and the dividends had been previously ordered to be paid to the wife by Vice-Chancellor Wigram. Lord Cottenham continued that, and therefore there remained in court the fund, the wife receiving the dividends without any direction how to apply them: there was no declaration of any interest or trust for the benefit of the children; but it was left in this uncertain way, either it was a trust with a large discretion in the trustee, or if it was not that, then it was a life estate in the wife with a power of appointment to the children, such either as were then living, or such as might be living at her death. Very little instruction is to be gained from that case; but even if it had been fully decided, it does not appear to me to touch the present case for the reason I have mentioned, that in the present case the testator sets out by declaring and directing — and by declaring and directing in the very same sentence (for the whole will is but one sentence) — that the gift to his wife in the first instance is a gift to and for the use and benefit of herself and her executors, administrators and assigns. Now, there is no such clause in the will in *Crockett v. Crockett*: it is only a direction that the property should be at the disposal of the wife for herself and her children.

There is another case of *Wood v. Wood* which has a little bearing upon this, but not sufficient bearing to make it necessary to refer to the case more specifically. But another case decided by Vice-Chancellor Wigram is somewhat like the present, or rather I should say somewhat like *Crockett v. Crockett*, — the case of *Raikes v. Ward*. The language in the will in that case was this: "I give to my dear wife Marianne all my personal estate, to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous." Now, the difference between that case and the present is this, that although there is a gift in the first instance to the wife, so far from there being any declaration that that gift is for the use and benefit of the wife, as there is in the present case, it is a gift to her expressly to the intent that she may dispose of the same "for the benefit of herself and our children in such manner as she may deem most advantageous." Now, in that case the Vice-Chancellor, Wigram, gave his opinion that there was a trust, but that the court would not deprive the widow of the honest

exercise of the discretion which the testator had vested in her. It will be observed that in that will there are express directions that the wife is to have a discretion as to what she considers the best mode of disposing of the property for herself and children; and therefore, though there was no decree, because the matter was necessarily referred to the Master to take the accounts, the Vice-Chancellor expressed his opinion — I think a very just and sound opinion — that there was a trust there, and that there was by the express terms of the will a discretion to be exercised by the wife, which, if honestly exercised, the court could not interfere with.

These two cases of *Crockett v. Crockett* and *Raikes v. Ward* appear to me the two cases which most nearly approach the present. At the same time, neither the one nor the other appears to me to govern the case now before me; I think that I must declare that the wife is entitled to have the whole residuary personal estate transferred and paid to her for her own use and benefit, and decree accordingly. By that means it appears to me that I am making a declaration which expresses her right almost in the very terms of the will; at the same time I shall be directing that the property be handed over to her, to be dealt with by her as she thinks fit, as any other property which is to be for her own use and benefit.

And I may observe, that there are two cases which, though not governing the present, might possibly help to show that I should be right in so deciding. I refer to the cases of *Cooper v. Thornton* and *Robinson v. Tickell*. In *Cooper v. Thornton*, the testator, by his will, gave "to Thomas Cooper 100*l.*, to be equally divided between himself and his family;" and after the death of Thomas Cooper, and of the executor who had paid the 100*l.* to Thomas Cooper, the children filed a bill against the surviving executor, who was the widow of the testator, and also, I think, the residuary legatee of the testator, calling on her to pay them the 100*l.* Lord Alvanley decided that the 100*l.* was rightly paid to Thomas Cooper, upon the footing that the testator meant it to be handed over to the parent, leaving the parent to apply it for the benefit of himself and his family. And upon appeal to Lord Thurlow, Lord Thurlow affirmed that decision. The case before Lord Alvanley and the case on appeal are reported in the same volume of Brown. That was a decision that in a case where a sum of money was given to A. to be equally divided between himself and his family, the money was rightly paid over to A. Now, *Robinson v. Tickell* was decided by Sir William Grant upon the authority of that case of *Cooper v. Thornton*. The gift there was this, it was a bequest of 2,000*l.* stock to Mrs. Hooke for her life (but that bequest has nothing to do with the question), and when she died with remainder to her daughter, "and my niece Mary Ann Robinson, for her and her children's use which she either now has or may have, for ever." So that there was, in fact, a gift of 2,000*l.* stock to Mary Ann Robinson for her and her children's use, that is, any children she has now, or may have hereafter. Upon the authority of *Cooper v. Thornton*, Sir William Grant decided that the 2,000*l.* stock should be handed over to Mrs. Robinson, leaving her to execute such trust as was created,



for the benefit of her children. Now, in subsequent cases, it has been observed on these two cases of *Cooper v. Thornton* and *Robinson v. Tickell*, that there was no decision that would amount to a trust; but that, assuming there was a trust for the children or the family in the case of *Cooper v. Thornton*, assuming, I say, there was a trust, the money was rightly paid over to the parent, leaving the parent to deal with it, and leaving the parent amenable to such right, if any, as the children might have as between the parent and the children.

Now, I mention those two cases, not because they govern the present, but because I think that, even upon the authority of those two cases, if I were of opinion that there was a trust here created on this property for the benefit of the children of this testator, I might still in conformity with those two cases direct the property to be handed over to the parent. I recollect in referring to these cases that they have the authority or sanction of such names as Lord Alvanley, Lord Thurlow, and Sir William Grant. I must honestly confess that if it had not been for those authorities, if it had been a case where a trust was created, I cannot see the propriety of handing over trust property to the trustee, leaving the trustee, although the parent of the children, to deal with the property and make away with it, so that the children might never be able to recover it in case the parent died, having spent it. I should have thought, I confess, that the children would have been entitled to have the property secured at all events, if there was a trust at all. And in *Woods v. Woods*, before Lord Cottenham, which was precisely the same case, Lord Cottenham held that the children might file a bill to secure the property. Now, in *Woods v. Woods*, the case was a very peculiar one. The testator had authorized his executors, who were his wife and his brother, to sell all his estates and chattels, and he gave them authority not to sell if they thought it most advantageous and most desirable to keep them. The purpose of the sale was chiefly to pay his creditors, and then he says that he desires that every creditor should have his money if the property is sold. It is to be observed, he gave an absolute discretion to the trustees either to sell or not to sell; but if sold, "all overflush," that is, the surplus, "to my wife, towards her support and her family, if any there be, after paying my brother for his trouble, and all other debts whatsoever." There was, in fact, a direction that if a sale took place, after paying the creditors and all other liabilities, the overplus was to go to his wife towards her support and her family. Now, one would think that according to the cases of *Cooper v. Thornton* and *Robinson v. Tickell*, which I have referred to, that might have been a very proper case to have said, "this overflush may be properly paid to the mother, leaving her to deal with it as the court in those other cases left the parent to deal with it." And accordingly upon a bill being filed by the children, a demurrer was put in to the bill, and no doubt upon the authority of those cases. Now, when it came before Lord Cottenham, Lord Cottenham overruled the demurrer. He said there was some interest in the children, and such an interest, at all events, as entitled them to file a bill to have the accounts taken.

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Jones v. Morrall.

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Well, if I, in this case, were of opinion that a trust was created, I confess I do not very well see my way to part with the fund. But being of opinion that the testator, although he expressed a confidence which he reposed in his wife, inasmuch as he has stated that he gives the property to her for her own use and benefit, and in the very same sentence states as if he were stating his reason for so doing, because he reposed such trust and confidence in her, that she would do what was right, — for these reasons, and following those cases which I have cited as governing the present, I consider that there is no trust here created, but that, at all events, without declaring that there is no trust, I should declare that the wife is entitled to have the whole property. The surplus has been ascertained, I believe, and the declaration will, therefore, be that she is entitled to have the surplus of the personal estate paid and transferred to her for her own use and benefit, and decree accordingly.

The cases to which the Vice-Chancellor was referred were the following:—*Hamley v. Gilbert*, Jac. 354; *Hammond v. Neame*, 1 Swanst. 35; *Foley v. Parry*, 2 Myl. & K. 138; *Broad v. Bevan*, 1 Russ. 511, n.; *Collier v. Collier*, 3 Ves. 33; *Andrews v. Partington*, 2 Cox, 223; *Curtis v. Rippon*, 5 Madd. 434; *Conolly v. Farrell*, 8 Beav. 347; s. c. 14 Law J. Rep. (N. S.) Chanc. 189; *Costabadie v. Costabadie*, 6 Hare, 410; s. c. 16 Law J. Rep. (N. S.) Chanc. 259; *Leach v. Leach*, 13 Sim. 304; *Cafe v. Bent*, 3 Hare, 245; s. c. 13 Law J. Rep. (N. S.) Chanc. 169; *Bowden v. Laing*, 14 Sim. 113; *Wetherell v. Wilson*, 1 Keene, 80; s. c. 5 Law J. Rep. (N. S.) Chanc. 235.

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JONES v. MORRALL.<sup>1</sup>

April 21 and May 5, 1852.

*Executors, Liability of—Wilful Default—Interest on Balances—Costs.*

In an administration suit by one executor against his co-executors, the pleadings raised a question of wilful default; but upon the hearing, a decree was made for the common accounts of what had been received, without any special direction or inquiry as to what might have been received but for the wilful default of the defendants. Upon the cause coming on for further directions, it was held that the plaintiff was then precluded from raising the question as to wilful default, but that if the question were still open, the plaintiff could not call upon his co-executors to account for what he jointly with them might have received.

The plaintiff claimed interest upon balances remaining in the hands of the defendants:—

*Held*, that the court was not precluded from entertaining this question by the decree, which might have afforded materials for forming an opinion; but the circumstances of this case

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 630.

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were not such as to entitle the plaintiff to interest, there having been no improper retention of balances to any substantial amount.

THIS suit was instituted to administer the estate of a lady named Frances Morrall, who died in the year 1823. The testatrix made a will in execution of a power during the life of her husband, and appointed certain property, about which no question arose. Upon the death of her husband, the testatrix made a codicil to her will, by which she disposed of certain leasehold estates, and she then directed that the household goods, farm-houses, cattle, farming implements and other effects (except money and plate) being in and about the manor-house of Plas Yellen, should remain there for the use of her son William Morrall during his life; and after his decease, the same should be equally divided amongst all her children that should be then living. The testatrix gave the residue of her personal estate to be divided equally between all her children, and appointed her sons, C. Morrall and R. Morrall, and the plaintiff, Thomas Jones, who had married one of her daughters, executors of her will.

The testatrix died in December, 1823, leaving eight children, and the will and codicil were proved by the three executors. In May, 1829, the plaintiff Jones became a bankrupt, and obtained his certificate in the following September. In December, 1834, the share of the plaintiff's wife in the residuary estate of the testatrix was assigned by him and his assignees to Edwards, who, on the 7th of April, 1835, executed a deed declaring that he was a trustee for the plaintiff. In March, 1835, W. Morrall died, upon which the furniture and other effects in and about the mansion-house of Plas Yellen became divisible amongst the seven children of the testatrix. On the 25th of April, 1835, the plaintiff Jones and his wife filed a bill against the other children, including the two who were jointly with the plaintiff executors of Mrs. Morrall, for an account of her personal estate. That bill was not actively prosecuted, but lingered on till 1840. In the mean time, C. Morrall, one of the executors, died, and his daughter, Mrs. Gooch, was appointed his executrix. A bill of revivor and supplement was then filed, seeking an account of the personal estate of the testatrix which had come to the hands of C. Morrall and R. Morrall. In August, 1840, answers were put in giving the accounts asked for, but no decree having been taken, the bill was dismissed for want of prosecution upon the motion of the defendants. The costs were subsequently taxed, and ordered to be paid by the plaintiff, but had not in fact been paid.

The present bill was filed by Jones and his wife in November, 1843, alleging that many of the household goods and other effects left in and about the mansion-house of Plas Yellen at the time of the death of the testatrix had been removed and misapplied by W. Morrall during his life, with the sanction of the two executors, C. Morrall and R. Morrall; and that the said goods, &c. had not been converted into money nor divided amongst the children of the testatrix as directed by her codicil, but that they had been taken possession of by the defendant R. Morrall, and had become greatly deteriorated in value;

and alleging that improper payments out of the estate of the testatrix had been made to W. Morrall, amounting to the sum of 760*l.* 17*s.* 11*d.*; that the defendant, R. Morrall, had improperly retained in his hands part of the assets of the testatrix, and that the plaintiff's wife had not received what she was entitled to as her share of the estate; and the bill prayed an account of the personal estate of the testatrix, and that it might be declared that C. Morrall and R. Morrall had been guilty of breaches of trust in permitting W. Morrall to receive the rents and profits of the leasehold estate, and in neglecting to divide the furniture, &c. upon the death of W. Morrall; and that the defendant, R. Morrall, and the representatives of C. Morrall, might be decreed to make good the loss occasioned by such breaches of trust, and might be charged with interest upon such sums of money as had remained from time to time in their hands, or had been received by them, or which but for their wilful default they might respectively have received.

The cause came on to be heard in July, 1845, and a decree was made referring it to the Master to take an account of the personal estate of the testatrix received by the defendants, and what portion of the estate remained outstanding or undisposed of, with liberty to state special circumstances as to the matters aforesaid; but the decree did not contain any direction to inquire as to what assets might have come to the hands of the defendants but for their wilful default, nor did it direct any inquiry as to interest on balances in the defendants' hands.

By the Master's report, it appeared that the balance of the personal estate of the testatrix received by the executors amounted to 767*l.* 18*s.* 5*d.*, of which the plaintiff's share was 95*l.* 19*s.* 9*d.* That the surviving executor, R. Morrall, was liable to the extent of 88*l.* 14*s.*, and that the plaintiff's share of the leasehold estate of the testatrix as against the estate of C. Morrall, the deceased executor, amounted to 158*l.* 5*s.* 9*d.*, out of which sum 154*l.* 3*s.* 9*d.* had been paid into court.

The suit now came on upon further directions.

*Stuart* and *Haddan* appeared for the plaintiffs, and

*Malins*, *Piggott*, *Kenyon Parker* and *C. Hall*, for the defendants.

Judgment reserved.

May 5. KINDERSLEY, V. C., (after stating the facts of the case, as already set forth, said)—The questions raised upon the cause now coming on upon further directions are these. First, it is contended for the plaintiffs that one of the defendants, R. Morrall, who is the surviving executor of the testatrix, and the other defendants, who represent the estate of C. Morrall, the deceased executor, ought to be declared liable for the value of certain furniture and other effects remaining in the mansion-house at Plas Yellen on the death of the testatrix. Secondly, that those defendants are liable for interest on balances remaining in their hands from time to time, and ought to ac-

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*Jones v. Morrall.*

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count for the rents and profits of certain leasehold property; and thirdly, that the costs of this suit ought to be paid by the defendants; first, because of a refusal on their part to account, and secondly, because they have disputed the plaintiff's claim.

Now, according to the terms of the will of Mrs. Morrall, the eldest son was entitled to the furniture, &c., during his life, and upon his death it was to be divided between her other children, of whom there were seven. After the death of the testatrix, all the executors, C. Morrall, R. Morrall, and the plaintiff himself, Thomas Jones, proved the will. At the time when the plaintiff became bankrupt he was entitled in right of his wife to one eighth of the residuary personal estate of the testatrix, and to one seventh of the furniture, &c., at Plas Yellen, after the death of W. Morrall. On his bankruptcy, of course, the plaintiff's share passed to his assignees; but by the deed of 1834 the plaintiff's share was assigned to a trustee for him. Now, as to the first point, regarding the furniture, it appears that the question is raised by the pleadings in the suit; but the decree not only declared nothing respecting it, but gave no directions for any inquiry on the subject, on the result of which the court could, upon further directions, proceed. What the decree directed was, an account of such personal estate as had been received by the executors, and a direction that an account should be taken of the furniture and other things, so far as such things had been received; but there is no direction for any inquiry as to what they might have received but for their wilful default. If it had been intended to raise that point, the court ought to have been induced at the hearing to make some declaration or to direct some inquiry, on the result of which, upon further directions, it might act. The rule on this subject I conceive to be this: if the pleadings do not raise the point, it cannot be raised either at the original hearing or on further directions; but if the pleadings do, as in this case, raise the point, whether the defendants are liable for wilful default, it is the duty of the plaintiff, if he can make out a case, to get a declaration by the decree, or if he cannot make a case for an immediate decree, to get an inquiry of such a nature that the court may, on further directions, make a declaration. If, however, the point was raised on the pleadings, and the court, by its decree, passed it by, and neither made any declaration nor directed any inquiry, it must be taken, either that it was waived by the plaintiff or that the court, being urged by the plaintiff, did not think fit to give any relief. Now, here the court has directed no special inquiry, but in directing the common account of the general estate, has said,—take the account also as to the furniture, that is, of what has been received, not of what might, but for wilful default, have been received. The decree further directs an inquiry as to what is outstanding; so that if any part of the furniture, &c., had not been received, it would come under the words "outstanding estate." Now, the Master has found that there is no outstanding estate, and as no exception has been taken to that report, the question is concluded. But if it were now open, I think the plaintiff could not have the relief asked. It appears that the plaintiff Jones, as one of the executors, proved the will him-

self; and thereby took upon himself the execution of the trusts as much as his co-executors; and if a party thus under an obligation to perform a trust does not choose to perform it, but loaves it to his co-executors, he cannot be entitled to call upon them to account for what they and he together might have received. For all these reasons, I am of opinion that there is no ground for making the defendants liable for the value of the furniture and other effects which the plaintiff alleges ought to have been realized and divided.

The second point is this: the plaintiff contends that the defendants ought to be held liable for interest on the balances from time to time remaining in their hands. Now, it appears by the Master's report that, except as to two small sums of 95*l.* 19*s.* 9*d.* and 158*l.* 5*s.* 9*d.*, out of which latter sum, 154*l.* 3*s.* 9*d.* has been paid into court, every part of the plaintiff's share, as well of the general personal estate as of the leasehold rents, has been duly paid. The defendants insist that, applying the rule to which I have referred, the plaintiff cannot claim interest on balances because there was no declaration or inquiry as to balances at the hearing. It appears to me that, according to the proper application of that rule, the plaintiff has a right to raise the question. It is true there was no declaration to that effect at the hearing, but there was a direction to take the common account of what had been received, and that was the first step towards such a declaration. The court could not at the hearing say whether there were any balances, but the direction to take an account of the personal estate ought to show what personal estate has been received from time to time, and the receipts and payments should be shown upon the schedule; and on that report the court might hear it argued what balances there were in respect of which either an immediate declaration or further inquiry could be made. In this case, then, the question is, whether the circumstances are such as to show that if there are balances there ought to be interest on those balances. It appears that Jones, the plaintiff, became a bankrupt in May, 1829, which is twenty-three years ago; and as, at that time, all interest passed out of him, he could not then ask for payment, and no payment could properly have been offered to him. In 1834, his share was assigned to a trustee for him, and he was then in a position to ask for accounts in respect of the personal estate of the testatrix, and directly afterwards he filed a bill, but that bill, after lingering for five years, was dismissed for want of prosecution, and then the present bill was filed in 1843. Now, in order to give a claim for interest there must be a clear case of improper retention of balances to a substantial if not to a considerable amount; but here the total balance retained from the personal estate does not amount to 96*l.*, and the total sum for which the surviving executor is found liable is only 88*l.* 14*s.* Under these circumstances, there is no ground, in my opinion, for decreeing payment of interest on the balances.

The last point is, whether the plaintiff ought to have his costs on the ground of a refusal by the defendant to account. The circumstances as to the refusal appear to be these: that immediately after the execution of the deed by which Edwards became a trustee for

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 Reynell v. Sprye; Sprye v. Reynell.
 

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the plaintiff in 1835, the plaintiff's solicitor wrote to the two executors, C. Morrall and R. Morrall, asking on behalf of Edwards for an account. An answer was returned within a fortnight, that an account should be rendered, and directly afterwards the bill was filed. In the answers to that bill the accounts were set out, but the bill was dismissed for want of prosecution. When the present bill was filed another application for an account was made, and the answer was that the accounts had been put in upon oath. This certainly does not amount to a refusal to render the accounts. Then, it is said that the defendants have resisted the plaintiff's claim, by suggesting in their answer that the assignment to Jones by his assignees was without a sufficient concurrence by the creditors. I accede to the principle that if a defendant questions the title of the plaintiff and fails, and by that course puts the plaintiff to any costs, the defendant should pay so much of the costs as were caused by the objection; but here there has been no expense incurred, and the costs must therefore go according to the usual course in administration suits.

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REYNELL v. SPRYE; SPRYE v. REYNELL.<sup>1</sup>

January 15 to 30, February 9 and 10, and March 15, 1852.

*Fraud — Misrepresentation — Mistake — Setting aside Conveyance —  
Champerly — Jurisdiction of the Court of Appeal as to Costs.*

S. was aware that R. was entitled to property, but might not at first be aware that the interest of R. was not precarious, and impressed R. with the notion that it was so; S. however became aware that the interest was not precarious, yet he did not inform R. of that fact, but on the contrary still represented that it was both precarious and could not be established without difficulty, delay and expensive litigation. R. in such a state of circumstances sold one half of the estate to S., the latter giving him an indemnity against all costs of recovering the property, and representing that men of business conducted cases on the arrangement that no law expenses were paid unless the proceedings were successful; but if they were, that law costs were paid out of the money recovered, and the party conducting the proceedings and furnishing the information was allowed half what was recovered to satisfy him for risk of paying law expenses. Subsequently R. agreed to sell the other half for a stated sum. R. filed a bill to set aside the conveyance and to have the contract for the sale of the second moiety declared void, but died before the hearing, and the suit was revived by his devisee and executrix. S. filed a cross bill for the specific performance of the sale of the second moiety. In the first suit the solicitor of S. was made a party, and was charged with a participation in the fraud. The court below set aside the conveyance, and as the contract for the sale of the second moiety was based on the former conveyance it declared the same void, and ordered S. to pay the costs, but dismissed the original suit as against the solicitor, without costs. The court also dismissed the bill for the performance, with costs. From this decree S. appealed:—

*Held*, that as R. did not know his rights when he executed the conveyance, nor when he signed the contract for the sale of the second moiety, and that as the former was based on fraud and misrepresentation, and as the latter depended on the former, both must fail, and the decree must be affirmed, with costs.

Where a party has induced another to act on the faith of several representations made by

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 633.

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him, any one of which has been made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made, or was the result of innocent error.

A representation that remuneration for professional services rendered, as above statd, was customary, being untrue, is a ground for setting aside a conveyance and contract founded on it.

Whether the agreement amounted to champerty, or savored of champerty, still as the parties were not *in pari delicto*, and as the vendor had no legal advice but that of the solicitor of the purchaser, who adhered more to the purchaser than to the vendor, and failed in his duty to the latter, the court considered that the vendor's suit ought not to fail, on the ground that he was a party to a contract against public policy or illegal.

Where the Master of the Rolls or a Vice-Chancellor has given substantial relief against a defendant, with costs against him personally, it is competent to this court, in affirming the decree as to relief, to vary as to costs, if its dissent from the decree as to costs is strong, clear and undoubting.

The court being of opinion that, although the solicitor had acted contrary to public policy, whether through misapprehension or otherwise, and although his duty professionally prohibited him from assisting where there was *aliud simulatum aliud actum*, and although he abetted in the composing and uttering of documents which recorded an affair as it was not, yet still as the court had no firm impression that the decree below ought to have charged him with costs, it refused to vary the decree in this respect.

THE facts of this most remarkable case, disclosed in voluminous pleadings and lengthy evidence, and above all to be extracted from a correspondence, a copy of which occupied more than 200 very closely written brief sheets of paper, can only be stated with comparative shortness in a narrative form; and (throwing out of view all but the prominent circumstances<sup>1</sup> on which the judgment of the Court is founded), these facts were as follows:—

Henry Reynell, of Leatherhead, by his will, dated the 19th of December, 1813, devised his real estates consisting of lands and other hereditaments in the counties of Devon, Somerset, and Surrey, of the annual value of 1,200*l.* to Mr. Trower and Mr. Walker in fee simple, upon trust to pay off certain charges, and among them an annuity to Mrs. Williams Reynell, his illegitimate daughter, and then unmarried, until she should attain the age of twenty-one years, and subject thereto, upon trust, for that lady for life, with remainder to her issue in strict settlement, with remainder to Sir Thomas Reynell for life, with remainder to his first and other sons in tail male, with remainder to Sir Richard Littleton Reynell (brother of Sir Thomas) for life, with remainder to his first and other sons in tail male, with remainder to Samuel Reynell for life, with remainder to his first and other sons in tail male, with remainder to Sir Richard Littleton Reynell, his heirs and assigns for ever.

The testator died in 1824 or 1825. At the date of the will and of the death of the testator the whole property was mortgaged in fee, the testator having only an equitable fee simple in it.

In the middle of the year 1843, Mr. and Mrs. Williams Reynell, who were married before the death of the testator, were living, she being aged forty-eight years and he much older; there had never been any issue of the marriage, and the lady was in a very infirm

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<sup>1</sup> Among the circumstances omitted are long details of an attempt, which proved abortive, to introduce into the will a power of appointment to Mrs. Williams Reynell in favor of her husband for his life.



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state of health. Sir Richard Littleton Reynell was then dead without issue male, and Mr. Samuel Reynell was also dead without issue. Sir Thomas Reynell was sixty-six years of age, and his wife, Lady Elizabeth Louisa Reynell was fifty-eight, and there had been no issue of their marriage, which had been solemnized many years. It was not asserted by any one that Sir Richard Littleton Reynell left any female issue. Under this state of circumstances, in the middle of the year 1843, the estates of Henry Reynell, the testator, stood, in fact, limited to trustees (new trustees having been appointed in 1828 in a suit then instituted), in trust for Mrs. Williams Reynell for life, with remainder to Sir Thomas Reynell for life, with remainder to the right heirs of Sir Richard Littleton Reynell. If this latter gentleman actually left no issue female, Sir Thomas Reynell was his heir-at-law, and had been so from the time of his death, and unquestionably Sir Richard Littleton Reynell died intestate.

In March, 1843, Capt. Richard Samuel Mare Sprye was informed by a surgeon, named Llewellyn, that Sir Thomas Reynell was entitled to interests in the property under the will of Henry Reynell. On the 15th of April following commenced a correspondence between Capt. Sprye and Sir Thomas Reynell. In these letters Sprye inquired of Sir Thomas as to his pedigree, stating as his reason his intention to publish genealogies, and wishing that of the Reynell family.

On the 21st of April, one Mitchell, described by Sprye as his clerk, read the will of Henry Reynell at Doctors Commons, and communicated verbally its contents.

By letter, dated the 22nd of April, Sprye stated to Sir Thomas that he had made a discovery, which, though it could not benefit Sir Thomas himself, might benefit his heir. The earliest letter of importance was one from Sprye to Sir Thomas, dated the 29th of April, 1843, and was as follows:—"My dear sir,—I hope you received my last note, making inquiry as to who at present stood in the position of your heir-at-law. I sent a sketch of your pedigree for a few of the modern descents, to assist you in discovering it, should you not otherwise know. I think I did not inform you that I have taken to study for the bar, in the genealogical branch, for practice at the bar of the house of lords, in peerage cases; and that I am, in furtherance of this plan for future life, compiling some genealogical works for print, to bring myself into notice in that way by the time I am called to the bar. The Reynell family I take particular interest in, collecting a complete history of it for print; and it has been in making researches for it, through my record researches in the several depositories of public records, that I discovered what I conceived to be the means of benefiting your heir-at-law. Since I wrote to you I have employed my clerks in still further investigating the matter, and to see if it was not possible to do the benefit to you, instead of to the other party. It is, as all these things are, doubtful, and can only be tested by legal proceedings, the result of which may give nothing, and may gain something considerable. Now, almost all men are frightened at the idea of law proceedings to recover property, and, consequently, a system has grown up among men of business, of

conducting such cases on the arrangement that no law expenses are paid unless success attends the proceedings; in which case they are first paid out of the money recovered, and the party conducting the proceedings and furnishing the information is allowed for his compensation half what is recovered, which is also to satisfy him for the risk of paying the law expenses, without perhaps succeeding. I have mentioned briefly to a legal man the case and mode in which I consider I have discovered a way to benefit your heir-at-law. He has not yet given me a decided opinion, but from what he observed I considered my belief strengthened. He said if he found what I stated to him to be borne out by documents, he would undertake the case legally, on the usual arrangement, as above. There is but a faint chance that the discovery can be made to benefit you, and as, whether for you or for your heir-at-law's benefit, it will be necessary to institute legal proceedings, will you say if you will be content that it shall be done under my direction and control, on the foregoing plan; that, if you are benefited nothing, you pay nothing, and the lawyers lose their expense and labor; and that if you are benefited, you will allow half of what may be gained to you to them, for their risk and remuneration. I shall be glad to hear from you at your leisure on this point, and also to have what help you can give in discovering to us your heir-at-law, as that party must be included, even if efforts be first made for you. I writ this hastily to save to-night's post. I beg our united compliments to Lady Elizabeth Reynell and family, and remain, my dear sir, yours, &c.,

"RICHARD SPRYE,"

6, Chesham Place."

Between the end of April and the middle of July there passed between these parties a vast number of letters, one of which, dated the 12th of May, was addressed by Mr. John Yonge, the solicitor to Sprye (but the draft of which was proved to have been written by Sprye for Yonge to copy), and stated that considerable property might be recovered for Sir Thomas after the death of the present possessors, if Sir Thomas were then alive, but if not, for his heir, and saying that much inquiry would be necessary, and that but for Sprye's discovery the present possessors might have kept the property, and Sir Thomas's claim might have been barred by lapse of time, and alleging that his claim must depend upon surviving the present possessor. That possessor was Mrs. Williams Reynell.

The next letter of importance was dated June 1, and was written by Sir Thomas to Sprye, and dated from Avisford, and contained these words:—"My dear sir,—I am very much obliged to you for the trouble you have taken in explaining to me further particulars of the business in hand, and, after reading over carefully your letter of yesterday, I feel satisfied that the first proposed arrangement, whereby I meant to engage to give up the half of the property recovered, subject to no law expenses, either on success or failure in the suit, is the best for me to pursue, and I therefore agree to it, hoping that the result may hereafter prove to our mutual advantage." The correspond-

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ence had, in some of the letters of Sprye, referred to some degree of relationship existing between the family of his wife and that of Sir Thomas.

On the 24th of July, 1843, a deed, dated the 15th of that month, was executed, being made between Sir Thomas Reynell of the first part, Sprye and Henrietta Digby his wife of the second part, and Charles Wilson of the third part, which contained the following recitals:—"Whereas the said Sir Thomas Reynell is seized to him and his heirs in fee simple in remainder or reversion under a will, or alleged will, of Henry Reynell, late of Leatherhead, in the county of Surrey, Esq., since deceased, of and in the hereditaments hereafter mentioned, and one moiety or equal half part whereof is intended to be hereby released, or the said Sir Thomas Reynell is seized of an immediate estate to him and his heirs in fee simple of the same hereditaments as the heir at law of the said Henry Reynell. And whereas the said Sir Thomas Reynell has not any issue; and whereas the said Richard Samuel Mare Sprye being connected by marriage with the family of the said Sir Thomas Reynell, and the said Sir Thomas Reynell having lately discovered or ascertained his rights and interests in the estates late of the said Henry Reynell, deceased, through the intervention of the said Richard Samuel Mare Sprye, and from information derived from him, the said Sir Thomas Reynell has determined upon testifying his regard and friendship for the said Richard Samuel Mare Sprye and Henrietta Digby his wife, by conveying and assuring one moiety or half part of the said estates late of the said Henry Reynell, deceased, to the uses and in manner hereinafter declared of and concerning the same."

It was then witnessed that "in pursuance of and for effectuating the said determination, and in consideration of the premises, and for making a provision for the said Richard Samuel Mare Sprye and Henrietta Digby his wife," and for certain nominal considerations, Sir Thomas conveyed to Wilson in fee simple one moiety of and in all manors, lands, estates and hereditaments in the counties of Surrey, Devon and Somerset, or all or any of the said counties or elsewhere in Great Britain of, in, and to which he was or could or might be entitled in possession, reversion, remainder, or expectancy by devise, descent, succession or inheritance howsoever, of, from, by, through, or under the said Henry Reynell, deceased, to such uses as Sprye and his wife should appoint, and in default to the use of Sprye and his assigns for life, with remainder to the use of his wife and her assigns for life, with ultimate remainder to the use of Sprye, his heirs and assigns forever. Then followed a covenant for further assurance.

Simultaneously with this conveyance Sir Thomas executed to Sprye a power of attorney "irrevocable," to commence, carry on, and prosecute any actions, suits, or other proceedings at law or in equity, he, Sprye, might deem requisite for trying the validity of any will, or alleged will, of Henry Reynell, or obtaining legal and peaceable possession of the real estate to which Sir Thomas was entitled by devise, descent, or otherwise, by, from, through, or under Henry Reynell. Also at the same time, and dated the same day, Sprye executed to

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Sir Thomas a deed of indemnity against any costs, charges, or expenses occasioned by any action, &c., brought by Sprye in consequence of the power of attorney.

The deed of conveyance had formerly been intended to be in the form of a settlement, but that form was ultimately abandoned. In preparing all the instruments between Sir Thomas Reynell and Sprye, Mr. John Yonge acted as the solicitor for Sprye.

Among the evidence was a draft marked Exhibit R, which was of a proposed deed between Sir Thomas and Sprye, in which, in consideration of services rendered by Sprye in the discovery of Sir Thomas's rights, Sir Thomas was made to convey the moiety, and Sprye covenanted to take all steps necessary for the recovery of it, and to save harmless and indemnify Sir Thomas from all the costs; but this draft was afterwards altered, and ultimately the conveyance was executed as before stated. Added to all this a codicil was prepared for Sir Thomas to sign by way of confirming all the arrangements, but it was never executed.

In pursuance of this power of appointment, Sprye and his wife, by deed, dated the 13th of January, 1844, appointed the same moiety to William George Watson and James Watson, and their heirs, by way of mortgage for securing 400*l.* and interest; and by another deed, dated the 23d of April following, they further charged the property with 300*l.* and interest to the same persons.

On the 15th of June, 1843, Mr. Stinton, of the Chancery bar, had given an opinion on a case submitted to him by Sprye, in which he stated, speaking of the title to the estates in default of children of Mrs. Williams Reynell, "Sir Thomas Reynell would have an estate for life, with remainder to his sons in tail: the ultimate remainder in fee was given to the late Sir Richard Littleton Reynell, and that estate would by the settlement be vested in any person to whom he may have devised it; but if he did not so devise it, Sir Thomas Reynell would have the ultimate vested remainder in fee, as the heir at law of his late brother, which I presume he is."

Upon the evidence it was not plainly shown when this opinion was communicated to Sir Thomas Reynell, but Sir James Wigram, when the case was originally before him, considered that the opinion was not communicated to Sir Thomas before the 15th of July, 1843, and both the Lords Justices came to the conclusion, that Sir Thomas, if it was communicated at all, did not understand his rights when he executed the deed of 1843, and signed a draft of an intended deed (hereinafter mentioned) of 1844. Mitchell, Sprye's clerk, was not examined as a witness in the court below, and was stated to be dead at the date of the appeal.

The second part of the narrative relates to a contract for the sale of the remaining moiety of the property. After the correspondence had gone on for many months, during which Sir Thomas was informed of the proceedings which Sprye had commenced and was prosecuting against the trustees of the will of Henry Reynell, and against Mr. and Mrs. Williams Reynell, Mr. Yonge addressed a letter to Sprye, dated the 17th of April, 1844, but which was copied from a

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draft made by Sprye, which contained the following remarkable passages, and which was forwarded by Sprye to Sir Thomas Reynell on the 18th of the same month, as a letter addressed by Mr. Yonge to him.

" 20, Tokenhouse Yard, April 17, 1844.

" My Dear Sir, — Having endeavored during the leisure hours of the Easter holidays to give my best consideration to the present position of the Williams Reynell case, I am anxious to put you in possession of the views I have formed, not only as your professional adviser, but as entertaining the highest friendship for yourself and family. You will therefore bear with me while I candidly confess my sentiments, even if they should happen to differ in some respects from what I know to be your ideas. You must bear in mind that when we commenced operations, although you soon accumulated a good deal of valuable information, we were left in the dark on several points in which we have been in some measure rectified by the answers put in. For instance, we had reason to expect Mr. Reynell left sufficient personal estate to pay off existing mortgages, which, however, appears is not the case, and the mortgages still exist. We were unprepared to find that Mrs. Williams Reynell had ventured to appoint a life interest in the estates in favor of her husband after her decease, and that, in fact, very soon after the testator's death she executed a settlement of the property, giving that interpretation to the trusts of the will which we have resolved to dispute, and vesting the estate upon such in a Mr. Beverley instead of Munro and Thomas Williams." . . . "The decree when made will direct inquiries in the Master's office as to the testator's estate, and the mortgages and settlement, and perhaps ultimately a new settlement may be ordered, and when after all by the demise of Mrs. Williams Reynell, and if by having previously set aside her husband's life interest, the estates become indisputably yours and Sir Thomas Reynell's, in all probability a fresh resort to chancery will be requisite to partition the property, as, being so scattered, it may be difficult otherwise to apportion. The value of your interest, to yourself individually, of course, in great measure depends upon your chance of surviving Mrs. Williams Reynell. She is forty-eight, and you, I think I recollect, are three years younger. Female lives, every insurance office will say, are more durable, and if Mrs. Williams Reynell lives on for a few years longer she may possibly live to old age. I think an office would say her present chance of duration of life is at least eighteen years. To this period, then, it is possible your benefit may be postponed, and, though hitherto childless, her having issue I know would by many be considered as a contingency not to be overlooked. Under all these circumstances of the case, the long litigation we may anticipate, and the certain heavy expense incurred, which will involve my often resorting to you for supplies, it well becomes you to consider how far it may be advantageous to you, or otherwise, to proceed. Had it so happened that the whole estate in reversion had been yours, there could not have existed the same ground for hesitation. You might then have found little difficulty in obtaining pecu-

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niary assistance to enable you to buy up or make terms for Mrs. Williams Reynell's life interest, put an end to the suit, and acquire the fee simple. At all events, you would have had more facility in obtaining means to carry on the suit vigorously, and then compel our opponents to an amicable arrangement, or speedily obtain all the court would enforce. These considerations, I confess, have impressed me with the value of a suggestion hinted to me by more than one with whom I have had occasion to advise,—that if you could feel at liberty to do so, it would be well for you to treat with Sir Thomas Reynell, for the purchase of his remaining moiety in the property. Of course, one would take every means of ascertaining what, under the circumstances of the case, with all contingencies, would be a fair price for you to offer, and for him to accept, and, agreeing upon this, I cannot but think it would be the most eligible arrangement possible for yourself and family, while Sir Thomas would realize at once a present benefit, instead of having the mere title to a prospective advantage, which, at his age, might be realized only in his declining years. Should the suggestion meet your view, and the proposal be not unacceptable to Sir Thomas I should advise that a statement of Sir Thomas's interest be prepared in such a manner as shall be mutually approved by him and yourself, and then that each obtain the valuation from an actuary of his own selection. It will then be for you to adopt measures for providing sufficient funds to complete the purchase, and acquire the entire reversionary interest. Having now candidly expressed to you my mind, I leave the matter to your thoughtful consideration, and should recommend you to talk it over also with Mrs. Sprye and her trustee. Your determination I shall wait for ere I press forward for getting the bill amended; if you decide that it is ineligible to communicate with Sir Thomas on the matter, let me know, and then we will resolve how to proceed. I remain, my dear sir, very truly yours,

JOHN YONGE."

The correspondence proceeded, Sprye still adhering to his representation that the issue of the litigation was doubtful; yet, in a letter of the 26th of April, he offered to buy the remaining moiety at its full value; and although he spoke of the investment of his money in such a purchase as a "lottery investment," and although Sir Thomas, in his answers, expresses reluctance to sell to Sprye property which he (Sir Thomas) did not possess, and to involve him in risk, Sprye, on the 11th of May, addressed a letter to him, offering to buy, and urging him to sell at a value to be determined by an actuary, the other half, "with all its doubts and risks, the chancery suits pending, of your share of the reversion. If receiving the money while matters are in uncertainty is objectionable in the doubtful state of our suit in chancery, the sale may be made conditional on your right, whenever the reversion shall fall in." . . . "The money may be invested, but I had rather purchase at once." This letter contained a valuation of the reversion at 5,000*l.*, which, from the evidence, was not that of an actuary; and Mr. Yonge in his answer on oath denied it to be his. Sir Thomas, in reply to this, addressed a letter, dated the 11th of

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May, to Sprye, which, after speaking of the chancery suit, went on thus:—"but I assure you, that I dislike it and our future prospects, more on your account than my own, having already undergone heavy expenses in prosecuting your able researches, and having now such a prospect of large law expenses, particularly if they succeed in visiting you with their costs. I wish that I was a rich man, and could afford to assist you in your difficulty; but you are aware of the case, and I have little but my military income to look to, as the purchase of this place, and the expense to which I have been put to by it, has swallowed up all the little spare money I possessed. I am most anxious that you should not injure your finances by this business. I am ready to withdraw when you find that there is no hope of success remaining, and that a favorable moment has arrived for doing so. I have from the first put myself in your hands, and have implicitly conformed to what you advised and recommended, and will continue to do so." And in still further reply to communications from Sprye, he wrote the following letter to him:

"Avisford, 14th May, 1844.

"My dear Captain Sprye,—I have much gratification in acquainting you that your despatch, received this morning, with Mr. Yonge's estimate of the half of the reversion, has completed the work of reconciling me to the sale, as recommended by you and him, and removing the scruples I had entertained to that measure. I have so good an opinion of Mr. Yonge, and of his reasoning upon the subject, that I will not press any other valuation than his, but will consent to accept from you the sum of 5,000*l.*, and in the simple, and direct, and ordinary plan, according to your wish, in preference to investing the money in the funds to accumulate until the settlement of the suit, which I will endeavor to believe will prove most favorable to you and yours, rewarding you amply for your trouble, and reimbursing you for your outlay. . . . Believe me, my dear Capt. Sprye, always faithfully yours,

"THOMAS REYNELL."

Two days later Sprye, in a letter to Sir Thomas, said, "I feel equally glad you are satisfied with Mr. Yonge's valuation, who is a good and honest creature;" and, subsequently, the correspondence contained allusions by Sprye of an intention to compromise the litigation, and expressions by Sir Thomas of his gratification at the idea of compromise, as he never viewed the matter in the same sanguine light that Sprye did. On the 25th of May, the draft of the conveyance of the second moiety was prepared and was approved by both parties, but it was never executed.

Mrs. Williams Reynell died in February, 1846, and on the 18th of the following month, Mr. Yonge forwarded to Sir Thomas the drafts of the deeds of conveyance of the second moiety, altered so as to meet the fact of the death of that lady; and in his letter Mr. Yonge recommended Sir Thomas Reynell to employ his own solicitor. The matter was then placed by Sir Thomas in the hands of Messrs. Walker, Grant

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& Co., his solicitors, under whose advice the original bill was filed, on the 2d of April, 1846, by Sir Thomas Reynell against Sprye and wife, Yonge and Wilson, praying a declaration that the deed of 1843 was procured by fraud practised on the plaintiff by Sprye and Yonge, his solicitor; and that the same was void for fraud and champerty, except as regarded the mortgages of January and April, 1844; and that it might be declared that the contract contained in the letter of the 14th of May, 1844, was fraudulently obtained by Sprye and Yonge, and that such contract was void, and that the approval of the draft deeds of the 25th of May, 1844, was obtained by the fraud of Sprye and Yonge, and that those two persons might be decreed to pay off the mortgages and procure the reconveyances from the mortgagees; and that the deed of 1843, the letter of the 14th of May, and the approval of the 25th of May, 1844, and the drafts might be cancelled; and that Sprye and wife, and Yonge, might be restrained from interfering with the property, and also that Sprye and Yonge might pay the costs of the suit.

On the 28th of August, 1846, Sprye and wife filed a cross-bill against Sir Thomas Reynell and Wilson, praying specific performance of the contract contained in the letter of the 14th of May, 1844.

Sir Thomas Reynell died pending the suits, and the same respectively were revived by and against the universal devisee and legatee and executrix, Lady Elizabeth Louisa Reynell.

The causes were heard before Sir James Wigram during five days in April, 1849, and ten days in the following month, and judgment was given on the 6th of November in that year, when he made this decree: Declare the deed of 1843 void, except as to the two mortgage deeds of, &c.; and that the contract in the letter of the 14th of May, 1844, is also void. Declare that the defendant Sprye is bound to pay to, &c. (the mortgagees,) their executors, &c., principal, interest, and costs due on the mortgages, and to procure at his own expense a re-conveyance to Lady Elizabeth Louisa Reynell, or as she shall direct; take an account, &c., due on mortgages; direct Sprye, on or before, &c. to pay, &c., (the mortgagees) the amount found due. Declare the plaintiff is to be at liberty to use the names of Sprye, wife, and Wilson in procuring the re-conveyance; and that she is entitled to recover against Sprye principal money, interest, and costs she may properly pay to the mortgagees for procuring the re-conveyance. And, upon satisfaction of the mortgagees, deliver up the deed of 1843, to be cancelled. Let letter of the 14th of May, 1844, be forthwith delivered up to be cancelled. Injunction against Sprye as prayed, except for procuring the re-conveyance. Dismiss the bill, *Reynell v. Sprye*, as against the defendant Yonge, without costs; dismiss the bill *Sprye v. Reynell*, with costs; such costs, and also the plaintiff's costs in *Reynell v. Sprye*, (including the costs of Sir Thomas Reynell, deceased,) to be paid by the defendant, Sprye.

From this decree Capt. Sprye appealed, and during the argument it was stated from the bench that as in the judgment of the court it might be necessary to mention the name of Mr. Yonge, the counsel



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for that gentleman had their lordship's judicial authority to address the court on his behalf. This offer was refused on the ground that Sir James Wigram had acquitted Mr. Yonge of all immoral conduct. The court also permitted an affidavit to be read, proving the death of Mitchell, Sprye's clerk, between the hearing of the original cause and the appeal. Their lordship's also sanctioned an offer made by the counsel for Lady Elizabeth, to allow the answer of Mr. Yonge to be read in evidence, as an affidavit or deposition in favor of Capt. Sprye. The offer was declined, and Lord Cranworth remarked that no inference detrimental to Capt. Sprye could be drawn from the refusal, because the argument of his counsel was, that if Mr. Yonge were examined before a jury he would prove, not only what was contained in his answer, but much more which would be beneficial to Capt. Sprye.

*Kelly, Lloyd, and Shapter*, supported the decree of the court below.

- *The Solicitor-General (Sir W. P. Wood,) Bethell and Terrell*, appeared for the appellant.

*Cooper* was counsel for Mr. Yonge.

The argument of the counsel for the appellant was in substance as follows:—The case has been conducted on a theory most extraordinary, namely, that Capt. Sprye having found with ease and without trouble, that Sir Thomas was the owner of a clear and indisputable estate absolutely, subject only to the life interest of an infirm lady, had set to work to form a scheme of fraud and misrepresentation, by which to induce Sir Thomas to part with his property. It was said that the title of Sir Thomas was clear, plain, and indisputable, the only present obstacle to immediate enjoyment being the life of a lady of forty-six years of age. It was said that Capt. Sprye knew the title was clear; that he knew Sir Richard had died, and left no heir other than Sir Thomas. So far from that being so, in truth, the case at the outset was involved in doubt and difficulty, and so continued up to a very late period before the conveyance of the first moiety of the property; yet wonder had been expressed at the ingenuity and wickedness which could have raised a doubt—could have surrounded Sir Thomas with mystification of fraud and falsehood. All this was the theory of the bill, and well did counsel follow such instructions. It had been said that the title was plain, no doubt, no difficulty about it; and so Capt. Sprye knew, and all he had to do as an honest man was to tell Sir Thomas, that he could at once, after the death of the lady, walk unmolested into the estate. The estate was represented to be "at home" with most respectable trustees, and that the life estate was vested in a most respectable lady. What, however, was the truth? The trustees of the will of Henry Reynell renounced, and new trustees were appointed, and they were appointed in a suit instituted in the name of Sir Thomas, without his consent, and without his knowledge. As to the estate, the trustees had none,

for the legal estate was in mortgage. All this theory was adopted by Sir James Wigram, who believed from first to last that all the representations of Capt. Sprye were false — were mere inventions. So far from that theory being correct, it is clear that but for Capt. Sprye's great exertions the property would have remained under the power of the Williams Reynells, or their devisees, or others claiming under them. The impression on Sir James Wigram's mind, that the trustees were most respectable persons, could never be removed; nor was their respectability questioned; but the learned judge always seemed to refer to the fact that persons of such respectability would not engage in such a fraud. No one said they did. It is plain that Sir Thomas Reynell had as much knowledge of the subject after the discovery of the will, and before the transaction of the purchase of the first half, as Capt. Sprye himself had; that before and after, and up to the execution of the second contract, he was in possession of every fact that Capt. Sprye knew of the title. The true history of the knowledge of Capt. Sprye of the title to the property was disclosed in his answer to the plaintiff's bill, and was this, — one Llewellyn, a surgeon, told the captain that the Reynells were entitled to property, and asked him whether Sir Thomas had succeeded to any. On this the captain, who was intimately conversant with the Reynell pedigree, turned his attention to that, and after tracing its steps, came to the second baronet, and believed that the property vested in him "and his heirs in tail for ever" was the property alluded to by his informant. Llewellyn, however, told him that was the wrong clue, and added, that old Henry Reynell, of Leatherhead, had often told him (Llewellyn,) that Sir Thomas was his heir, and would have his property. Capt. Sprye, thereupon, said that was not possible, for Henry Reynell left a daughter; but Llewellyn added she was not legitimate; upon which Capt. Sprye declared that must be a mistake, for in Burke's Landed Gentry it was said that Henry Reynell left a daughter, who inherited his estate. Llewellyn, however, still persisted, and this led Capt. Sprye to make further inquiries, and convinced him that, whatever the will of Henry Reynell might be, it must be sought for, and the facts ascertained. But up to this time he knew nothing of the will; did not know that there was one; and yet the case had been commented on as if the will had been seen, examined, understood, and kept back from the knowledge of Sir Thomas Reynell. The first thing done by Capt. Sprye as to the will was to send his clerk, Mitchell, to read it, and subsequently he obtained a copy. Finding reason to believe what Llewellyn had said about the Williams Reynells, they in fact having been married secretly, he suspected that the will might not be a fair and clear transaction, and, doubting the legitimacy of the daughter from the positive assurances of Llewellyn, Capt. Sprye did entertain very grave doubts of the conduct of those parties. That his doubts were reasonable is tolerably plain both from the frame of the will and the conduct pursued towards it at Doctors Commons. The will was that of an attorney, and was altogether holograph. It was constructed of paper differing in hue and character, and the fourth and fifth sheets did not

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tally with the remainder at all, nor was the writing similar in different parts of the will,—these two sheets, in particular, being in the hand apparently of a lady. The sheets, however, purported to follow on, and the will to have been composed and written at one and the same time. It was plain that such was not the fact. Capt. Sprye found all this to be so, and, therefore, he suspected, and was right in suspecting, the Williams Reynells. When Capt. Sprye found that the very material paper not affixed by the testator to his will, and which gave a power to the daughter to appoint a life interest to her husband, had been fastened to the will by the husband after the testator's death, he had a fair ground of suspicion, and when he found this out, he communicated it to Sir Thomas Reynell. When he discovered, as he did from the affidavit of the husband himself, that that will had been examined by him and his attorney during the testator's lifetime, he had more than ground for suspicion—his doubts and suspicions were confirmed. When the probate was seen, that most important paper was copied, as if it had been wholly incorporated by the testator himself in his will. The observation made by one of your lordships that the knowledge of real property law possessed by solicitors is generally sound, is a very true representation if confined to country solicitors; but the easy access of London solicitors to conveyancers induces them to rely more on others than themselves, and, therefore, they are generally in the habit of referring every question for the opinion of counsel. This would fairly account for Mr. Yonge having laid the case on the will before Mr. Stinton instead of coming to a conclusion himself. If, then, it was not improper for the solicitor to seek that advice, still more was it to be expected that Capt. Sprye himself would not be able to form a clear and definite conclusion on the legal rights of the parties. Yet great stress has been laid on the fact of Mr. Yonge taking legal advice. In each place where Capt. Sprye used the word "contingency," it is put down to fraud, because it is said Sir Thomas Reynell was known to have a vested estate; whenever it is said that the benefit to Sir Thomas was contingent on surviving Mrs. Williams Reynell, it is alleged to be wilfully false, the fact being that Capt. Sprye, like any other man not a lawyer, considered the benefit to be contingent, for Sir Thomas, at his age of sixty-six, was not likely to outlive a lady of forty-eight. Is it to be said that because a man of sixty-six has a vested estate, the enjoyment of which must be postponed until after the death of a person forty-eight years old, it is a falsehood if represented as a contingent benefit? It is said that Sir Thomas Reynell's title was clear; but so far from it, there were three contingencies: first, whether he would survive Mrs. Williams Reynell; secondly, whether he could obtain possession, if entitled, without litigation; and, thirdly, what was the nature of the property, and whether it was worth anything, considering the incumbrances upon it. It must be admitted, as more than once said by one of your lordships, that the representation of business being conducted by a gift of half the property being the consideration for the lawyer's services, was "unlucky," and could not be defended; still that did not displace the

truth of the later parts of the case. In the court below it had been said, and Sir James Wigram concurred in the view, that the *onus* lay on Capt. Sprye to show that the opinion of Mr. Stinton had been communicated to Sir Thomas Reynell. Having remarked on the propriety of the taking of Mr. Stinton's opinion, it remains to be observed that the evidence is contradictory as to the time of its being communicated to Sir Thomas Reynell. In the first place, it is obviously most improbable that Sir Thomas Reynell did not see the opinion given by Mr. Stinton, and which in plain terms disclosed his rights; and, secondly, the opinion being in such plain terms, and in a narrative form, it was most improbable that he did not understand it. No one had ever ventured to allege that Sir Thomas Reynell could not understand what any ordinary man could comprehend; nor had those who had put the words of his sworn answer into his mouth ventured to permit him to swear more than that he did not recollect seeing the opinion, and that if he did see it, he did not understand it. That is a very tender mode of swearing. Accepting the acquittal of Mr. Yonge as proved, then the real case is that he made an erroneous conclusion of law as to Sir Thomas Reynell's title, and Capt. Sprye as innocently made the representation, and that representation has been unfairly described as a fraud and a falsehood. The truth about the rights of Sir Thomas being unknown, if it were so, to himself; was no person's fault but his own. All he said was, that if he did see the opinion of counsel he did not understand it. A gentleman of ordinary faculties could have understood it, and a gentleman of fortune could have obtained advice. If he would shut his eyes; if he would abstain from inquiry, the fault was at his own door. The court will not, and ought not, to help him. Complaint is made of the presentation of this petition of appeal, but, independently of Capt. Sprye, the case is thus:—A gentleman complained of having had a bill filed against him containing charges of the grossest fraud, and practices of the most obvious dishonesty, and the plaintiff, well knowing that the solicitor would be the most important witness to disprove those things if they were untrue, or to explain those transactions and their true nature, deliberately and for the purpose, it was fair to infer, of suppressing that evidence, made that solicitor (Mr. Yonge) a defendant to the suit. For such a reason alone justice has not been done, and the appeal is proper to be heard. The Vice-Chancellor made strong observations on this fact, in the course of his judgment in the court below, and gave that gentleman the acquittal to which allusion has before been made in these emphatic words:—"If I am to hold Mr. Yonge liable for the costs of this suit, it certainly will not be upon the ground of moral delinquency, but upon the ground that he has so mixed himself up with Sprye's acts that he must, for judicial purposes, be considered as identified with Sprye in those acts. But I think I should be going too far in so treating the case." And, again, his honor says, "A solicitor is not necessarily answerable for writing a letter to his own client for the purpose of being shown to others; and, if that be so, the circumstance that Yonge was expressing Sprye's opinions would not make the act

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fraudulent, provided those opinions were Yonge's also. I think the case is not brought within the anomalous rule relied on by the plaintiff for making Yonge a defendant in the suit." As to the first contract, it is an error to say it was a bargain obnoxious to the law relating to champerty; and as to the second agreement, it was not an undervalue. On the second, the evidence of four different persons well versed in the affairs of reversions proves that the 5,000*l.* was above the value. Champerty was defined to be a bargain to divide the land between the parties, if it were recovered at law, and by which one was to carry on the other's suit at his own expense. That was not so here. Here there was a deed of gift of half of whatever Sir Thomas was entitled to, if anything, and Capt. Sprye was to proceed to recover that half for himself and the other half for Sir Thomas. There was no covenant, no agreement, no contract by Capt. Sprye to prosecute the suit, and, therefore the bargain did not amount to champerty, *Wood v. Downes*, 18 Ves. 120; *Strachan v. Brander*, 1 Eden, 308; Co. Litt. and Fitz. N. B. tit. "Champerty." But supposing champerty to infect the case, in the first place the frame of the suit is erroneous, and in the second place the court will give no relief to the champertor. If Capt. Sprye is incriminated by his proceedings, so is Sir Thomas Reynell; they are *in pari delicto*. Look at the case made by the bill. The main ground on which relief is sought is, that a fraud has been practised by Capt. Sprye, in concert with Mr. Yonge, his solicitor, on Sir Thomas Reynell, and yet the evidence totally disproves this case. If Sir Thomas was deceived at all, it was not by Mr. Yonge in concert with Capt. Sprye, but by Capt. Sprye apart from Mr. Yonge; and it is contrary to every principle which governs the proceedings of the court that a plaintiff shall make a case of joint fraud by his bill, and sustain his case by proof of a fraud by one; he can no more do this than he can make that sort of case by his bill, and bring another and totally different case before the court by his evidence. Here the bill is filed, charging the fraud on both defendants, and if it be proved at all, which is denied, it is proved against only one, and on the authority of the case of *Wilde v. Gibson*, 1 H. L. Cas. 605, decided by the house of lords, this court is not at liberty to give the relief sought. With regard to the charge of champerty, no benefit can accrue to Sir Thomas Reynell or his devisee, if it be proved; for, by the statute 32 Hen. 8, c. 9, s. 2, it is enacted, that both champertor and accomplice shall be deemed equally guilty, and the subject-matter be forfeited to the crown. This decree ought, on every ground to be reversed; or, at any rate, the matter ought to be sent to a jury, when both Mr. Yonge and the present plaintiff could be put into the witness-box, and examined on behalf of Capt. Sprye.

The reply of Sir Fitzroy Kelly contained the following expressions: Is the allegation in the bill that the agreement for the conveyance of the first moiety of the estate was obtained by fraud and misrepresentation—rank fraud and gross and wilful misrepresentation—disproved by the defendant? I say it is not. Is it proved by the plain-

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tiff? I say it is. Upon the evidence it is clear that the representation that Capt. Sprye had discovered Sir Thomas's heir-at-law to be entitled to some property, through his record searches in the several depositories of public records, was a clear, plain, palpable, and deliberate falsehood, and known by Capt. Sprye to be so. I prove it to be false from Capt. Sprye's own account, for he says that he was told Sir Thomas was entitled to something by Llewellyn, and he knew it to be a fact from the will at Doctors Commons. It was untrue that the property, whatever it was, could not be recovered excepting by protracted, by expensive, and precarious litigation. It was untrue that the practice of solicitors — of respectable solicitors, and other professional men, is to conduct litigation for half the property recovered. To say so, is a libel on the profession, is a libel on the solicitors. It was utterly untrue, for no such practice did or does exist; and although Capt. Sprye has never been interrogated as to how or where he learnt that such a practice existed, he knew that a representation made by him, holding the rank of an officer and a gentleman, to Sir Thomas Reynell, an officer and a gentleman, was enough to make his assertion implicitly believed. In that sense, if in no other, it was a false and fraudulent misrepresentation. It was untrue, as stated by Capt. Sprye to Sir Thomas, that a suit was necessary to set aside the will of Henry Reynell to enable the baronet to take the ultimate benefit. In all these points, and in more, plain falsehood was told; and the fraud and misrepresentation contained in the letter of the 29th of April, 1843, were never abandoned, and that letter formed the basis of the transaction between the parties.

Their lordships reserved their judgment.

March 15. KNIGHT BRUCE, L. J. In these causes the original plaintiff, Lieut.-Gen. Sir Thomas Reynell, sought, and after his death, Lady Elizabeth Reynell, as his devisee and executrix, obtained, from a learned judge of this court, not now on the bench, relief against two instruments as effected in equity by unfair or improper dealing alleged to have taken place on the part of Capt. Sprye, who, with Mrs. Sprye, his wife, claimed the benefit of those instruments, their alleged rights under which they, by their suit sought, but in the opinion of the Vice-Chancellor who dismissed their bill, were not entitled, to enforce. The earlier instrument is a deed, by which Sir Thomas Reynell purported to convey, for the absolute benefit of Capt. and Mrs. Sprye, the interest of Sir Thomas Reynell in an undivided half of the freehold estates that had belonged to his distant kinsman, Henry Reynell, at the death of that gentleman, who died in the year 1824, owning freehold estates in Somerset and Devon, of considerable value, and leaving an only child, a daughter. She was not legally related to him. This lady, with her husband, a clergyman, named Williams, but called after Henry Reynell's death, Williams Reynell, was in the enjoyment of those estates from that event to her own decease, which happened early in the year 1846. The deed was executed by Sir Thomas Reynell in July, 1843. The other instrument is an agreement for the sale by him of the interest in the other half of the estates to Capt.

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Sprye for 5,000*l.*, a sum of which no part has ever been paid. Under this document, signed by Sir Thomas Reynell in May, 1844, there seems to have been some color, at least, for suggesting that Mrs. Sprye had acquired or might claim an interest, as well as her husband. The case brought before us upon a petition of appeal or rehearing, presented by Capt. and Mrs. Sprye, in each of the causes, occupied here, as it had done before Sir James Wigram, a length of time fully commensurate to its bulky materials and to the demands of justice — whether too long a time, or, if too long a time, whether the excess ought to be ascribed to the court, or the bar, or both, I need not now consider. The present is one of those instances of cross litigation, in which a dismissal of each of the contending parties is incapable of terminating the dispute between them, for that course taken here would leave Capt. Sprye at liberty to sue Lady Elizabeth Reynell (whether without or with a reasonable chance of success,) for the purpose of recovering against the assets of Sir Thomas Reynell pecuniary damages (substantial or nominal) upon the agreement of 1844, and the covenant contained in the conveyance of 1843. It is therefore necessary, not only with respect to the costs, but also otherwise, to determine whether relief ought to be given upon the bill filed by Sir Thomas Reynell, against which the suit of Capt. and Mrs. Sprye, it must be observed, cannot be viewed in the light merely of a defence, or merely of being auxiliary to the defence, and this, not because the bills of Capt. and Mrs. Sprye pray relief, but because they pray such relief as they do. Whatever may become of the suit of Sir Thomas Reynell, I apprehend that if we shall dismiss or affirm the dismissal of the bills filed by Capt. and Mrs. Sprye, that will amount to an adjudication that the two instruments in question (of which, if either confers any title at law, it is only a title to sue for pecuniary damages, inasmuch as H. Reynell's interest in his real property was equitable only,) confer in equity, either no title at all, or nothing beyond a title to proceed against Sir T. Reynell's assets for the recovery of pecuniary damages; while it is obvious that the success of Capt. and Mrs. Sprye, in their suit, must be destructive of Sir T. Reynell's suit, which on the other hand, cannot succeed without causing the total failure of the other. But there would be nothing absurd or anomalous in a dismissal of each of the bills; and as in most instances, so especially in this, the attack on each side requires a more forcible and clear case than the defence. I have but another word in the nature of preliminary observations to say, which is this — upon the assumption of the decree being right, as far as it goes, it might well, I think, have restrained Capt. Sprye in terms from suing Lady E. Reynell at law upon the two instruments respectively, an addition which I suppose that the Vice-Chancellor, if asked to make, would have made; for though an injunction of that kind is not, I believe, prayed on the record, the omission was, I apprehend, at the hearing of the causes, immaterial, whatever the rule may be as to interlocutory applications. The decree would, perhaps, have also contained provisions concerning some other documents in evidence in the cause, if this had been asked at the bar.

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[His lordship then read at length the deed of the 15th of July, 1843, and a letter of the 14th of May, 1844.]

As to the origin of these documents, it seems that in or before April of the year 1843, Capt. Sprye, perhaps in the course of some genealogical inquiries, perhaps otherwise, did, without any request from Sir T. Reynell, or employment on his part, discover or hear of the fact that H. Reynell had left a will, conferring reversionary interests in real property on Sir T. Reynell and his elder brother, Sir R. Reynell, which was proved, and deposited at Doctors Commons. It must also be taken that Capt. Sprye, in a manner open to some remark, did, between the end of March, 1843, and the end of June, 1843, communicate the fact of the existence of the will to Sir T. Reynell, and inform him that he was, or might possibly be, either under it if valid, or by heirship, interested importantly in the landed property of H. Reynell, property of considerable value. It may, moreover, be fairly considered as true, that Sir T. Reynell, though he had been acquainted slightly at least with that gentleman, and aware of a relationship between them, had, previously to receiving this information from Capt. Sprye, neither cared nor thought whether H. Reynell had left a will or property. Now, that possibly but for Capt. Sprye, the life of Sir T. Reynell might have ended without any attention on his part having been given to any such matter; that possibly but for Capt. Sprye, it might at this moment have been unknown to Lady E. Reynell that H. Reynell left either will or property; and that but for Capt. Sprye, possibly Mr. W. Reynell might now have been receiving and enjoying the rents of the estate—a possession which not very improbably might have continued until his death—there is, I think, no gainsaying. And inasmuch as the estates in question may be taken to be worth not less than 25,000*l.* clear, after discharging the burthens upon them, as at the time when the communication was made by Capt. Sprye to Sir T. Reynell, the true and real title to the estates was, for all purposes material in the present case, thus: that Mrs. W. Reynell was tenant for life, subject to impeachment of waste, with remainder or reversion (immediately in substance) to Sir T. Reynell in fee—as some timber had been cut irregularly—as some color had been given for an unfounded claim on the part of Mr. W. Reynell, to an interest for his own life—and as there was at least probable ground for questioning the propriety of the conduct of Mr. and Mrs. W. Reynell, and of the trustees or supposed trustees under the will, or one or some of them, in having omitted to inform Sir T. Reynell of the will, and in having dealt somewhat singularly with the paper under which that unfounded claim arose, it cannot, I think, be denied, that Capt. Sprye, by merely telling Sir T. Reynell of the existence and the nature of the will and of the place of its deposit, might have done a valuable act of service to him—a service which Capt. Sprye might have rendered in several ways; as, for instance, he might have said to Sir T. Reynell, “I am glad to be able to inform you of a circumstance which you are possibly not aware of; your kinsman, H. Reynell, of Leatherhead, left a will, under which some important interests in landed



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property appear to be given reversionarily to you, and to Sir B. Reynell; had you not better look after the matter? The will is at Doctors Commons." Now, if Capt. Sprye, on becoming aware of the will and the place of its deposit, a notorious and sufficiently accessible place, had taken this course, without any bargain or other motive than the wish to do as he would be done by, or to perform an act of mere good nature or courtesy to a respectable acquaintance — I say nothing of their common profession, or of Sir T. Reynell's age, services, and station — Capt. Sprye would have acted as, I hope, three out of four men in this country, similarly circumstanced, would have acted. Or it might have been thus: I have more than once, as probably many others have, received letters proposing to furnish some unexplained information alleged to be of an advantageous kind, in exchange for a preliminary coin, I think a sovereign, upon the safe transmission of which, but not before, the mystery was to be unfolded. If Capt. Sprye, taking such a course, had, before giving any information, required and received a promise from Sir T. Reynell that he would, upon learning something beneficial to him from the captain, give the captain half, or a quarter, or an eighth, of the value of what the information should enable or lead Sir T. Reynell to acquire, it may be that a jury would, in an action of assumpsit, upon the promise, have given the captain pecuniary damages, and that the verdict would not have been disturbed; but I do not think it likely that a court of equity would have assisted such a transaction beyond not refusing to recognize, as an effectual judgment for damages, or damages and costs, a judgment at law obtained fairly in such an action. Again, Capt. Sprye might have withheld the information from Sir T. Reynell until the latter had promised him a fair or sufficient compensation or reward in general terms for the communication. This, certainly, would have been a contract merely of legal cognizance, but if a judgment at law for damages, or damages and costs, had been obtained by Capt. Sprye upon it fairly, a court of equity would have recognized that as an effectual judgment for its proper legal purpose.

How far he acted in a manner similar or analogous to any of these modes, the pleadings and proofs before the court show. There may certainly be a difference of opinion among civil, if not among military, moralists, upon the question whether none of the possible lines of conduct that I have been mentioning would have been in any degree open to animadversion; but as to one of them, there could not have been the least difference or doubt; and as to the others, if not of the highest elevation, they would, at least, not have been of a perplexed, puzzling and cabalistical kind — there would have been something in a sense straightforward belonging to them — they would, in a word, not have been of that generally unlucky description — *acuminis nimii*. I have used the expression "valuable act of service:" the worth and extent, however, of that act, of that service, should of course be neither overrated nor underrated. The title and claims of Mrs. W. Reynell and her husband were merely and solely under the will. It was of the utmost importance to their interests that the will should be held valid and effectual; nor has it been shown or suggested that either

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of them, at any time, denied or questioned, or thought of denying or questioning, its existence or validity. They desired, indeed, perhaps fairly, perhaps unfairly, but certainly without any foundation, to give testamentary validity, as concerning the freehold property, to an invalid paper — (a paper at least invalid as to the testator's freehold property — and he does not seem to have had any copyhold property) — a paper, the sole effect of which, if valid as to freehold estate, would, through the execution by Mrs. W. Reynell of the power it purported to give, have been to confer a life interest on the husband. This wish, however, must have increased rather than diminished their inclination to support the will; which, in fact, is safe in Doctors Commons, and has continually been so for the last twenty-five years and more, including as part of it the paper professing to give the power just referred to.

H. Reynell's title-deeds, I believe, were, at his death, and have ever since been, held by none of the persons whom I have mentioned, but by a mortgagee under a mortgage, created, I think, by H. Reynell, which seems to be still unsatisfied, and by reason of that incumbrance the legal estate in fee in the property in question, as I collect, was at the time of the making of the will, and has ever since been outstanding. The will speaks of "moneys secured on my estates in the counties of Devon and Somerset, in mortgage to Mr. John Beague," and of "the said mortgage money due to the said John Beague." The testator describes himself in it as H. Reynell, of Leatherhead, and it seems highly probable that many persons at Leatherhead, and some, if not all, of the occupying tenants of the property were aware or had heard long before the year 1843, that Mrs. W. Reynell was not legitimate, and was entitled under the will of her reputed father, H. Reynell, of Leatherhead, to the real estate of which she and her husband were in the enjoyment. Upon the whole, if Capt. Sprye, at any period of the year 1843, thought it likely that, without and independently of any aid, interference, and communication on his part, Sir T. Reynell and his heir or devisee, if any, would remain for ever, or for so long a period as a twelvemonth, after the death of the survivor of Mrs. W. Reynell and her husband, ignorant of the existence, nature, or contents of H. Reynell's will, that opinion so entertained by Capt. Sprye was, in my judgment, founded on wrong calculations of chance and of probabilities, and in error.

But let us suppose that Capt. Sprye, acting gratuitously, had merely taken the first line that I have mentioned and then left Sir T. Reynell to himself. In what manner would Sir T. Reynell, if assumed to have had ordinary prudence or common discretion, have acted? He would have resorted to a competent solicitor, a man of consideration and experience; and accordingly, if not then knowing one of that description, would have procured some judicious friend to recommend him one. To this solicitor he would have stated the matter. The solicitor would have inspected the original will and have bespoken and obtained a copy of it, and have learnt from Sir T. Reynell the state of his family, including the probability that Sir R. Reynell, who certainly survived H. Reynell, had died intestate, leaving

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Sir Thomas heir of Sir Richard. The solicitor then would have made inquiries at Leatherhead and elsewhere, and would very easily and soon have ascertained the place of residence of Mr. and Mrs. W. Reynell, and the fact that she had never had, and was not likely ever to have, a child, and would also have guessed at least that an attempt would be made to give a life interest in the property to her husband, but would of course have felt perfectly satisfied that the attempt could not succeed, for the mere inspection of the will would have shown that though its validity as to freehold property was probable in the highest degree, except as to the paper under which alone a life interest could be claimed by him, that paper was clearly of no value as to freehold estates. The solicitor would also have felt convinced that Mrs. W. Reynell was neither heiress nor co-heiress of H. Reynell, and that she and her husband in all probability considered it most desirable for each, most material and important for the interests of each, that the will, whether without or with the unattested paper, should be supported as a good will of all the testator's property. The solicitor, having thus informed himself, which he would have done at a small expense, would then have applied by letter or personally in a civil and business-like manner to one of them, and so have learnt the name, abode, and calling of Mr. Monro, one of the trustees, and his connection or former connection with the property. But it must be recollected also that Mr. Monro is a deponent, or was intended to be a deponent, in the affidavit deposited with the will at Doctors Commons. By means of communications with that gentleman, Mr. T. Williams and Mr. and Mrs. W. Reynell, or one or more of them, the solicitor would have acquired a sufficient knowledge of the property, the timber cut, and the possession of the title-deeds by H. Reynell's mortgagee. This, too, would not have taken much trouble or time, and the solicitor would then have told Sir T. Reynell there was no doubt or perplexity or difficulty about the case, and that the freehold estates of H. Reynell, encumbered, however, of course as he had encumbered them, must be considered as certainly and safely the absolute property of Sir T. Reynell, subject only to these qualifications: first, the life interest of Mrs. W. Reynell, and the possible but necessarily hopeless claim on her husband's part of a life interest to himself; secondly, the very improbable possibility that Mrs. W. Reynell might bear a child; thirdly, the circumstance that the husband or wife, or both, having cut timber irregularly, might do so again; fourthly, the improbable possibility that Sir R. Reynell had left issue or a will disinheriting Sir T. Reynell; fifthly, the possibility that Sir T. Reynell might have issue, who would after his death be entitled.

Now, if the view and estimate of the facts and probabilities that I have stated are substantially, as I believe them to be, correct, two questions seem to suggest themselves: first, did Capt. Sprye render any important or considerable service to Sir T. Reynell beyond the mere fact of informing him that there was a will of H. Reynell's, under which Sir T. Reynell took valuable interests, whatever may have been the worth or merit of a service of that simple kind? A question which must, I think, be answered in the negative. Secondly, what

are we to think of the course of conduct pursued towards Sir T. Reynell by Capt. Sprye and his solicitor, Mr. Yonge, during the interval between the time when Capt. Sprye learnt the existence of the will and the time of Sir T. Reynell's execution of the impeached deed of conveyance in July, 1843? In considering this second question, we should probably proceed at once to that instrument itself which I have already read — a deed which, if its nature, foundation, and intention are to be collected merely from its language and contents, is simply voluntary, purely gratuitous. It does not mention or indicate that Sir T. Reynell had employed Capt. Sprye, or owed him money, or was or had at any time been liable to be sued by him at law or in equity; nor does it bind, or profess to bind him by covenant or otherwise to take any proceedings on the account or for the benefit of Sir T. Reynell, or to render Sir T. Reynell any services whatever. I may also observe that the connection by marriage which it mentions — a connection not proved or not otherwise proved — must have been slight or distant, if there was any at all; for though the connection is stated on the part of Capt. and Mrs. Sprye to have been constituted by consanguinity between that lady and Sir T. Reynell, there is no suggestion or any probability that either of them was descended from any great grandfather or grandmother of the other. Indeed, in a letter to Mr. W. Reynell, of the 15th of April, 1843, Capt. Sprye speaks of his own son's descent "from the old Devonshire branch of the family of Reynell, by matches of two or three centuries back, but nothing connected with the branch from which Mrs. Williams Reynell descends and represents." It seems, moreover, that previous to the year 1835, there had been no acquaintance whatever between Sir Thomas and Lady Elizabeth Reynell, or either of them, on the one hand, and Capt. and Mrs. Sprye or either of them on the other, and that if there was any intimacy it began in or after April, 1843; still, if the deed was not founded on an improper consideration, was not *turpi ex causa*, was intended by Sir T. Reynell to be in substance what it appears on the face of it to be, and was fairly obtained from him, it would be impossible to give relief against it. But how do those two or three circumstances stand? They stand as I now proceed to mention, first saying, however, though perhaps superfluously with reference to the expressions "improper consideration" and "*turpi ex causa*," that notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which in general it prohibits the introduction of extrinsic evidence to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits the terms of the contract, which it was written and signed for the purpose of expressing or recording, the rule is settled, and not merely in courts of equity, that a deed *ex facie* just and righteous, may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose contravening law or public policy; nor would I mention the well-known case of *Collins v. Blantern*, 2 Wils. 341, but for the sake of referring, as I pass, to the very useful note appended to it in Mr. John Wm. Smith's collection, vol. 1, p. 154.

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Besides the conveyance of July, 1843, there are in evidence two deeds, each of the same date with that. All were executed in July, 1843; two of those are produced, the other is proved by an admitted copy, and one of the two produced is the conveyance just mentioned, which the decree declares void. The deed proved by the admitted copy is a power of attorney from Sir T. Reynell to Capt. Sprye. The remaining deed produced is a deed of covenant to indemnify, from Capt. Sprye to Sir T. Reynell. Not however so, was the first intention of Mr. Yonge and Capt. Sprye, by whom or by Mr. Yonge, as Capt. Sprye's solicitor, which is the same thing; it seems to have been meant originally, if I draw a correct inference from the papers which I have seen, that there should be only two instruments, embracing, however, the objects of the three actual deeds, but in a form differing, and a mode varying from them.

[His lordship then proceeded to refer to and remark on the instructions laid before counsel, the observations of counsel on the drafts, and the final frame of them as executed in 1843; and then read *in extenso* the power of attorney and the deed of indemnity.]

Now, these three instruments, viewed together, do form certainly, even in their actual state of polish, no commonplace assemblage; but if we break the group into individuals, or into an unit and a pair, the result will not be less odd. Who saw ever before such a document as the impeached conveyance? And would it remove the surprise of any learned or unlearned person, having read that deed without any knowledge of the extrinsic facts, and immediately afterwards being informed of the existence of the two other instruments, to read them and find them what they are? In saying this, I do not exclusively allude to the word "irrevocably," contained in the power of attorney. Again, I apprehend that the power of attorney and deed of indemnity read in ignorance of the impeached deed and of the extrinsic facts, would create a strong suspicion of illegal or improper dealing. The appointment of an attorney irrevocable by an instrument having apparently no other purpose, and the taking of an indemnity from that attorney against the costs of the suits which, as the attorney, he shall institute, the indemnity being by a simultaneous instrument, having no other object, may well be thought out of the ordinary course of fair transactions. It is mere repetition, to observe, however, that the three documents together do not contain or express, do not profess to create, any agreement or obligation on the part of Capt. Sprye to institute or prosecute any suit, take any proceedings, make or pursue any investigation, or perform any operation whatever. Do then the three instruments, taken together, express the true intention and the whole agreement of the parties to them, or at least of Sir T. Reynell and Capt. Sprye, so that it could be fair or right, independently of any question of misdemeanor or public policy, to act on the impeached deed of conveyance simply according to its purport, or as affected only by the purport of the two other instruments?

[Here his lordship referred at great length to, and read throughout, the draft of the intended conveyance of the second moiety of the estates, and which is before referred to as exhibit R, and also made re-

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ference to many letters in the correspondence as illustrative of the agreement between Sir T. Reynell and Capt. Sprye.]

The understanding, the agreement, that I have been just mentioning, appears to me to have been in substance and effect this: that, inasmuch as H. Reynell was believed by Sir T. Reynell and Capt. Sprye to have died the owner of freehold estates considerable in extent and value, as Sir T. Reynell was neither in the possession or enjoyment of that property or any part of it, nor correctly aware of its particular situation or rental, but as they believed that in the character of heir, if he was the heir, of H. Reynell, or in the character of heir, if he was the heir, of Sir R. Reynell, or in character of devisee under the will, if there was a will, of H. Reynell, valid as to his freehold estates, or in more than one or each of these modes, Sir T. Reynell had some right or rights, immediate or not immediate, of more or less value or importance, to or in these estates, and as this right or supposed right, these rights or supposed rights, Capt. Sprye represented to Sir T. Reynell, and which he accordingly considered to be, of uncertain extent, likely to be resisted or questioned, nor susceptible immediately or easily of proof, the ascertainment, assertion, and establishment of this right, or these rights, if any, whether on the footing of intestacy on the part of H. Reynell, or otherwise, were to be, and were, undertaken by Capt. Sprye, so far at least as reasonable diligence and reasonable endeavors on his part would extend and could be effectual; that the expenditure for the purpose should be his; that Sir T. Reynell should be at no expense nor incur any liability, and that upon those terms Capt. Sprye should have half the benefit of what should be so ascertained, asserted, and established, that is to say, should, subject to the life estate if there should prove to be any, in Mrs. W. Reynell; to the life interest, if there should prove to be any, of her husband; to the interest, if any, of her possible issue; to the interests, if any, of Sir T. Reynell's possible issue, to the interests, if any, of Sir R. Reynell's issue, if any, and of his devisee, if any, and to the questions, whether material or immaterial, of Sir R. Reynell having been H. Reynell's heir, and Sir T. Reynell being Sir R. Reynell's heir, have half the freehold property of H. Reynell whatever it might be. Such an understanding, such an agreement, which were in my opinion expressed substantially with sufficient accuracy upon the exhibit R, in its original state, nor ever abandoned by Capt. Sprye or Sir T. Reynell, however affected by the agreement of May, 1844, may or may not have amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, but must in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a court of equity ought to discourage and relieve against. I need not repeat a reference to the authorities quoted during the argument, nor need I mention *Wallis v. the Duke of Portland*, 3 Ves. 494; *Kenney v. Browne*, 3 Ridg. P. C. 462; *Burke v. Greene*, 2 Ball & B. 517; and *Stevens v. Bagwell*, 15 Ves. 139; if they were not particularly cited. It was suggested, by one at least of the learned counsel, that cases between solicitors and clients, and cases where the illegality of a contract, or its contraven-

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tion of public policy, has been effectually alleged by a defendant against a plaintiff, furnish little or no support to a bill such as that of Sir T. Reynell; and it may be true that principles or rules are applicable to transactions between solicitors and their clients, which are not applicable to those between persons standing not in any such or any similar relation to each other; but it was not, nor could reasonably have been said, that a transaction may not be bad for champerty or maintenance, or to use a phrase more than once found in the books, as "savoring of champerty," though between persons not affected by any such or any analogous connection. Again, we know that there are instances in which a case, available and effectual in this court for defeating a plaintiff, is unavailable and ineffectual for the purpose of obtaining a decree against a defendant. Upon many a contract, whether bad or good at law, this jurisdiction has refused to act, whether for or against the instrument or transaction, and in the present instance of course the dismissal of the bills of Sir Thomas and Lady E. Reynell would not necessarily be inconsistent with the dismissal of the bills of Capt. and Mrs. Sprye. It is obviously true, that Sir T. Reynell participated in the transaction which I have just described and characterized, and if he and Capt. Sprye had been, to use the old legal phrase, *in pari delicto*, and public policy ought not to be considered as interested in favor of allowing one to sue the other for relief against the contract, there might possibly be ground for contending that Sir T. Reynell's suit ought to fail. But where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams*, 18 Ves. 379, is one. Here it cannot reasonably be said that Capt. Sprye, in the matter of the impeached deed of July, 1843, was not more blamable than Sir T. Reynell, who either had not a legal adviser as to the matter or had none but Mr. Yonge, and if Mr. Yonge was so, then he adhered much more to Capt. Sprye than Sir T. Reynell, and failed in duty to the latter, who I am, upon the evidence, convinced did not suppose that in entering into the agreement on the basis of which the impeached deed was executed by him, or in executing it, he was doing an act contrary to public policy, or illegal, or open to the censure of a court of justice. I believe he did not mean to do anything wrong.

But what are we to say or think of Mr. Yonge, and Capt. Sprye, who had had Mr. Yonge for his adviser? Did either of them suppose the agreement unobjectionable? If so, why was the conveyance framed as it was? Why did it not express and embody what was the true bargain, the true arrangement? Why, as I said before, were there three instruments? Whatever the case was between Sir T. Reynell and society at large, he was, as between himself and Capt. Sprye, entitled to believe the incorrect and unwarrantable statements contained in the letter of the 29th of April, 1843, in these words — "A system has grown up among men of business, of conducting such cases on the arrangement that no law expenses are paid unless suc-

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cess attends the proceedings; in which case they are first paid out of the money recovered, and the party conducting the proceedings and furnishing the information is allowed for his compensation half what is recovered, which is also to satisfy him for the risk of paying the law expenses, without perhaps succeeding." And again, when speaking of "a legal man" unnamed, the writer uses this expression: "He said, if he found what I stated to him to be borne out by documents, he would undertake the case legally on the usual arrangement as above." I call these statements incorrect and unwarrantable, on the supposition, which I think reasonable, that Capt. Sprye, in using the words "men of business" and "legal man," meant Sir T. Reynell to understand him as referring to decent people, to persons of possible respectability, and not to barristers or counsel whom no inn will own, and solicitors estranged from every roll. What too can be said for Mr. Yonge's letter of the 12th of May, 1843, in which, without any expression of surprise, dissent, or disapproval, he, an admitted and enrolled attorney, writes of the "informant" or supposed informant of Capt. Sprye, considering himself "entitled to half the property when recovered, after payment of all expenses, which, however, he was to defray if unsuccessful," and afterwards uses (not as it seems ironically, or at least not with apparent irony) the word "generously," the same letter recommending "some legal document stipulating to the above effect?" Some legal document! Whatever may have been the object or influence under which Mr. Yonge consented or submitted to write that letter, is Capt. Sprye at liberty to allege for any effectual purpose in this litigation, that Sir T. Reynell was not entitled to believe it the spontaneous letter of a professional man, able and willing to advise according to his position and station? A letter less objectionable might have been made worse by the fact that its language was dictated or suggested to the writer by the person to whom it was written; but this letter seems beyond any such heightening.

Perhaps it might with some plausibility be suggested, as an argument against the illegality of the deeds of 1843, or their contravention of public policy, that Sir T. Reynell's rights were so certain, plain, and clear as to exclude any notion of rational controversy. It must, however, be recollected that the validity of H. Reynell's will, as a will of freehold estates, had been represented to Sir T. Reynell, and must be taken to have been considered by him as questionable—that the same may be said of the possible result of the claim to a reversionary life interest for Mr. W. Reynell—that difficulties had been suggested as to the heirship and intestacy of Sir R. Reynell which cannot be thought to have had no influence on Sir T. Reynell's mind—and that his notions of the construction and effect of the will were vague and obscure. To his apprehension, therefore, and in his understanding when he executed the deeds of 1843, and when he signed the draft of 1844, his rights were not certain, plain or clear. Believing them to be otherwise, he acted on that idea, and, ignorant of the law, entered into a bargain with views and for purposes prohibited by law. It was his intention to break, not knowing, the law



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No man can say that Sir T. Reynell would have executed any one of the deeds knowing at the time the nature and extent of his rights, and that they were plain and clear, nor capable of being rationally opposed.

The possible argument to which I have just been referring, exhibits also this dilemma; If from the certainty, clearness and plainness of Sir T. Reynell's rights, there was no breach of law or public policy in the transaction of 1843, and the facts and circumstances of that transaction have been correctly viewed by me, what answer is there to the case alleged of mere fraud? I repeat distinctly, that in my judgment Sir T. Reynell did not know or did not understand accurately or sufficiently the material facts, the extent of his rights, their nature, and the rules of law applicable to the will, when he executed the deeds in question, or when he signed in 1844 the draft of the proposed conveyance under the agreement of May, a draft recognizing and purporting to confirm the conveyance of July, each of which acts he did either without any legal assistance, or with worse than none.

Anything, to my apprehension, more thoroughly bad in equity upon the whole than the deed impeached I never knew; nor, after close attention to the subject, can I hesitate as to relieving against it in Sir T. Reynell's suit. If, indeed, after its execution, he had, with sufficient knowledge of the true state of the facts and of his rights, either confirmed the deed or allowed Capt. Sprye to bestow labor and incur expense on the basis of it, and in reliance on it, a different course might very possibly have been correct; but no such case is proved, or in my opinion provable. There was no substantial difference, it is plain, in my judgment, between the state of his mind and information when he executed the deeds of 1843 and when he signed the draft of the conveyance. I have, before proceeding to the consideration of the agreement of May, 1844, but one thing more to say; that is, to express pointedly my regret that the letter of the 12th of May, 1843, should have been written; that it should have been transmitted to Sir T. Reynell, and that the episode of the suggested codicil, by which among others these papers are diversified, should have been possible; though whether the first idea of the codicil formed itself in a mind familiar with the case of *Powell v. Knowler* in the second volume of *Atkyns' Reports*, p. 226, I know not, nor attempt to guess.

With respect to the agreement of May, 1844, it is so closely connected, so intimately associated, with the impeached deed, that the deed failing, I do not see how the agreement can with propriety be supported. Can it be alleged that without the deed, without the transaction upon the basis of which Sir T. Reynell was induced and intended to execute the deed, can it be safely said that free, and knowing himself to be free, from that transaction and the deed, he would have made the agreement? Would not to hold the latter binding on him be in a sense to give a degree of force and effect to the deed? Retaining the agreement, would not Capt. Sprye be retaining a benefit substantially under the deed? I am of opinion that Sir T. Reynell having entered into the agreement under the erroneous

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notion that he was bound by the deed, from which, in my judgment, his devisee is entitled to be delivered, and relieved, that lady is entitled to be delivered and relieved from the agreement also. And this I say independently of the very questionable means (they were probably more, indeed, than questionable) to which, subsequently to October, 1843, Mr. Yonge and Capt. Sprye, or one of them had recourse, for the purpose, I will not say of driving, I will not say of coaxing, I will say of conducting Sir T. Reynell into the agreement, in which matter as to legal or professional advice he stood as he did in the matter of the deeds. It is impossible, however, without deep concern, to see what the case is with respect to the letter of Mr. Yonge of the 17th of April, 1844, transmitted by Capt. Sprye to Sir T. Reynell, and with respect also to the document transmitted to him in Capt. Sprye's remarkable letter of the 11th of May, 1844, written at Tonbridge, Wells—a document as to which Capt. Sprye, in a later letter to Sir T. Reynell of the 16th of that month, says—"I feel equally glad you are satisfied with Mr. Yonge's valuation, who is a good and honest creature." By calling, however the letter of the 11th of May "remarkable," I do not mean to attribute that distinction to it exclusively among the letters—far from that—though it does mention "an actuary," and speaks of "doubts and risks and chancery suit pending," and "the doubtful state of our suit in chancery." Sparing myself the task of saying more on this topic, I proceed to state that the conveyance of July and the agreement of May must, in my opinion, fall together and be dealt with not differently.

[His lordship then read the instructions then laid by Mr. Yonge before counsel for the preparation of the conveyance of the second moiety, the draft of that deed itself, the alterations in it, and the fact of Mrs. Sprye's name being introduced into the transactions, and Sir T. Reynell's surprise thereat, and other particulars disclosed in the evidence.]

Much has been said with more or less weight on the subject of Mr. Stinton's opinion, and the disabling Mr. Yonge as a witness by making him a defendant. The opinion of Mr. Stinton may or may not have been seen by Sir T. Reynell before he executed the deeds, but this I believe, that whether without or with any bad motive, the opinion, if communicated, had not been explained to him properly or sufficiently, if at all, before he executed them, or before he signed the draft of 1844; and that, as I have said, when he executed them, and when he signed the draft of 1844, he did not sufficiently understand his true position and circumstances with respect to the property in dispute. How otherwise are we to account for his letter of the 11th of May, 1844? Is it to be attributed to forgetfulness, cunning, or to what? Perhaps this document is the most observable of the many, I had almost said unaccountable, papers which this case contains.

Stress was also during the argument professed to be laid on a case decided by the house of lords in the year 1848, reported by Messrs. Clark & Finnelly, *Wilde v. Gibson*, 1 H. L. Cas. 605; which, however, can be better and more thoroughly understood by reading the printed appeal papers belonging to it, but especially the examination of it, in a treatise of the law of property as administered by the

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house of lords, by Sir Edward Sugden (Lord St. Leonard's), p. 614, published in 1849, a well-known and valuable work, where the learned author has elaborately considered the case, on which if his comments are well founded, it is perhaps as remarkable as any in the history of civil judicature of the house of lords. But whether his view of the facts, the equity and the law of it, or on the contrary those taken by the peers, who advised the house of lords upon it, are correct, it is binding here as an authority, and, if it can, ought to be applied in this instance. I do not find myself able, however, so to apply it, or to agree with the learned counsel for Captain and Mrs. Sprye, in their assimilation of it to the present. I do not consider the former as furnishing a rule or precedent for the latter. It has been contended, that fraud or impropriety of conduct has not been alleged by Sir T. Reynell's bill, except as against Capt. Sprye and Mr. Yonge jointly, and that as Mr. Yonge has been dismissed, though without costs, and there has not been a petition of rehearing or appeal by him or Lady Elizabeth Reynell, the consequence must be the dismissal of Sir T. Reynell's bill. To this, however, I cannot accede. Upon the circumstance that the actual petition of rehearing or appeal is general and unlimited, and that Mr. Yonge, a respondent to it, has appeared upon it, I lay no stress. I give no opinion whether *rebus sic stantibus* the court has jurisdiction to vary the Vice-Chancellor's decree in a manner favorable to Mr. Yonge, or unfavorable to him. But I apprehend it was clearly within the judicial power of the Vice-Chancellor dismissing Mr. Yonge, to make with consistency the decree which I find made against Captain and Mrs. Sprye. The argument has in effect gone the length of contending that if relief in equity is sought against a man alleged to have obtained an instrument by fraud, or otherwise improperly from the plaintiff for the benefit of the defendant, and the facts alleged as constituting or showing the fraud or impropriety, are proved against him, and do constitute or show the fraud or impropriety, the suit must fail, because the bill has incorrectly and untruly alleged the third person to have been a participator and actor in the facts, with such intentions and in such a manner as to have been guilty of the fraud or misconduct equally, and in coöperation with him. That incorrect and untrue mode of stating the case may affect the costs, but to say that it can do more is to contradict alike theory and practice, precedent and principle. Where, indeed, it can reasonably be suggested that the defendant may have been to his prejudice crippled or misled in his defence by the plaintiff's inaccurate mode of stating his case, the court has the means of providing a remedy for any possible injustice, not only, as I have said, in point of costs, but by giving the defendant an opportunity of adducing evidence, or further evidence, before itself, or a Master, or a jury. Here, in my judgment, neither Captain nor Mrs. Sprye has been crippled or misled in their defence.

And let me observe that whatever ought to be thought of Mr. Yonge's conduct as fraudulent or free from fraud, it is clear that in a course of acting contrary to public policy, and to rules by which a professional man especially ought to hold himself bound, Mr. Yonge

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has, through misapprehension or insufficient information, or otherwise, without or with censurable intentions, directly participated; and as he was personally mingled with the case in 1843 and 1844, so he appears in it in a questionable light often enough to relieve from blame and to prevent much wondering at the act of making him a defendant. Nor am I sure that if Mr. Yonge had been made by the Vice-Chancellor liable for the plaintiff's costs in Sir T. Reynell's suit, I should have been prepared to dissent from that. Here there was a masked transaction. A solicitor ought to know that his duty professionally prohibits him (if as a man he is not by instinct drawn back) from assisting or lending his name or credit where there is *aliud simulatum, aliud actum*. Here there was *aliud simulatum, aliud actum*. Mr. Yonge was an abettor in composing and uttering documents which, not recording an affair of business as it truly was, did record it as truly it was not. And why? Because the true transaction was unlawful — because, truly told, it announced its own failure, vanity, and nothingness (to use no harsher term,) and this is done by a minister, an officer of the superior courts of justice. If Capt. Sprye (whether student or not) was unaware of how the English laws regard the traffic of merchandising in quarrels, of huckstering in litigious discord, or was ignorant of the value of truth merely as a commodity in business, Mr. Yonge should have informed him better; nor in any event should Mr. Yonge have allowed Sir T. Reynell to remain at once without a solicitor and without a due understanding of the manner, the grave manner, in which he, a gentleman and a soldier, full of years and honor, was committing himself. Still I cannot say that I have a firm impression that the decree ought to have charged Mr. Yonge with the costs, and he will be neither charged nor relieved on this occasion. It has not indeed been suggested for him, that he ought to have his costs.

It has been said likewise, that Sir T. Reynell's bill, so far as it is directed against Capt. Sprye on the ground of fraud distinct from champerty, or supposed champerty, and distinct from any question of public policy, is, if not groundless, at least exaggerated and inflamed in a manner to be disapproved and discouraged.

For this argument, whatever its weight or extent, there was probably more foundation in a former than in the present state of the bill, and perhaps even in its actual state there is some room. The mode of acting, however, which Capt. Sprye seems to have thought justifiable, was such, on his part, that he cannot, I think, well complain that it was viewed unfavorably even without regard to any question of mere law or public policy. And if it was merely an error even without regard to any question of mere law or public policy, still, if so far as Sir T. Reynell's suit is concerned, the decree had exempted Capt. Sprye from a portion at least of the costs, it may be that I should have agreed. Sir T. Reynell was not a young an embarrassed, or an isolated man; he was not out of society; was well connected; was the brother-in-law of an archbishop; was often or occasionally in London; was in good circumstances; of high military rank; and had the means of obtaining with facility the best

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advice. If he was deceived, he was so under circumstances that do not, it is true, induce me to say, *qui vult decipi decipiat*, but may remind one perhaps of the saying. And if it was merely an error, he recalls that passage in the Digest, lib. 22, tit. 6, 9, where Paulus tells us — “*Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur. Quid enim, si omnes in civitate sciant quod ille solus ignorat? Et recte Labeo definit: scientiam neque, curiosissimi neque negligentissimi, hominis accipiendam, verum ejus, qui eam rem diligenter inquirendo notam habere possit. Sed juris ignorantiam non prodesse, Labeo ita accipiendum existimat; si juris-consulti copiam haberet vel sua prudentia instructus sit, ut, cui facile sit scire, ei detrimento sit juris ignorantia. Quod raro accipiendum est.*”

Sir T. Reynell, too, though not as I have said in equal fault with Capt. Sprye, was a party to a bargain against public policy. Yet if these considerations are insufficient, as of course they are, to justify disingenuousness, how very far are they from affording an excuse for turning to advantage the unsuspecting trust of confiding simplicity. Whatever may formerly have been the course, or supposed course of this jurisdiction, it is now, I apprehend, considered, that where the Master of the Rolls or the Vice-Chancellor has, by decree, given substantial relief against a defendant, with costs against him personally, it is competent to this jurisdiction, upon a rehearing, by way of appeal, affirming the decree as to the relief, to vary it as to the costs; but I conceive that to render this course correct, there ought to be a judicial dissent as to the costs, strong, clear, and undoubting. That the decree here, so far as it goes, is certainly right in the relief which it gives, I have no doubt; and as to the costs of Sir T. Reynell's suit, if I doubt, I cannot say that I do more; or that the inclination of my opinion is not with the decree in this respect.

It is of necessity included in what I have said, that in my opinion the bills of Capt. and Mrs. Sprye must stand dismissed; but I will add that this I should have thought right, even had it appeared to me correct to dismiss the other bills; for upon all the principles which have guided the Court of Chancery during a long series of years and now regulate it, the indisputable facts of the case show an absence of all title on the part of Capt. and Mrs. Sprye to ask what their bill asks from a court of equity. This is plain and clear, nor perhaps would it be wrong to say, too plain and clear for argument. To suppose a court of equity capable of interfering for the purpose of giving specific effect to either of two such instruments as the conveyance of July, 1843, and the agreement of 1844 obtained as they were, is surely to suppose it capable of forgetting or abandoning every rule of rational jurisprudence. The claim, indeed, of Capt. Sprye, as a plaintiff, ought to be carefully all along distinguished as I have just been distinguishing it, from his resistance as a defendant. The claim of Capt. Sprye as a plaintiff, brings to mind the commencement of one of Lord Hardwicke's judgments, *Bridgman v. Green*, 2 Ves. sen. 627, in which he says, “Next to the surprise and concern one has to see persons enter into such a combination as this, is the surprise to

see it contended in a court of justice. It is most extraordinary to think a court of justice can wink so hard as to suffer it to be supported." That case is particularly mentioned by Lord Eldon in another, where the most striking perhaps of Sir Samuel Romilly's replies was made, *Huguenin v. Baseley*, 14 Ves. 284; the judgment delivered in which contains more than one remark not without bearing here. There, too, the person alleging that she had been unfairly dealt with, or unduly influenced, was plaintiff. It is impossible, I think, to doubt that the Vice-Chancellor disposed justly and correctly of the costs of the suit of Capt. and Mrs. Sprye, and I consider the costs of the appeal ought to be borne in the same way.

There are two or three matters, not probably of much importance, which the decree has not, but which very possibly the Vice-Chancellor, if asked, would have provided for: first, I think, that Lady E. Reynell should undertake to abide by such order or orders as the court shall now or hereafter make concerning the deed of indemnity; and that the deed of indemnity and any draft or drafts in existence which Sir T. Reynell has signed of the three instruments, or any one or more of them, or of the conveyance under the agreement of 1844, should be deposited in the Master's office, subject to further order. Next I consider that if Lady E. Reynell shall desire it, there should be an injunction restraining Capt. Sprye from bringing or prosecuting any action, or proceeding at law against Lady E. Reynell as the executrix or devisee of Sir T. Reynell, upon or in respect of the two instruments which the decree declares void, or either of them, or any draft or drafts signed by him of the deed which the decree declares void, and of the conveyance under the agreement of 1844, or either of them. I have reason to believe that in affirming the decree, with costs, and with the additions to it that I have mentioned, and in the undertaking to be required, and which has now been given, Lord Cranworth agrees with me. Whether he does so in the mode I have arrived at this conclusion, the bar will, I doubt not, have the satisfaction of hearing from himself.

LORD CRANWORTH; L. J. Sir T. Reynell, the original plaintiff, rested his right, and Lady E. Reynell, as representing him, now rests her right, to the relief sought to be enforced in this suit on two grounds: first, that the instruments impeached are void on the ground of fraud; and, secondly, that they are so as founded on champerty. Sir James Wigram decided in favor of the plaintiff on the first ground; and, after a full consideration of the facts, I am of opinion that they do disclose a case of fraud, entitling the plaintiff on that ground, to what he seeks by his bill; so that the decree is in all essential points correct. My learned brother has gone so fully into the case, that agreeing with him, as I do, in the result at which he has arrived, it might perhaps have been enough for me simply to express my concurrence, and so leave the matter where it now stands. But considering the nature of the dispute, we thought it more fair to the parties to reduce to writing each of us his view of the case, so that it might not only appear that we concurred in the same result, but

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also that the reasoning which each of us had, separately, deemed sufficient to warrant the conclusion at which we had arrived, might be explained.

I have said that the facts established in proof disclose a case of fraud fully warranting the decree. It may be impossible to give a definition of what constitutes fraud in the contemplation of a court of equity, so as to meet all the various combinations of circumstances to which the word may apply; but there can be no difficulty in saying that whenever any one has, by wilful misrepresentation, induced another to part with his rights on the belief that such representations were true, this is, in the plainest and most obvious sense a fraud which this court will not tolerate. Now, I am of opinion that beyond all doubt Sir T. Reynell was induced to execute the conveyance of the 15th of July, 1843; which it is the principal object of this suit to set aside by repeated misrepresentations made to him by Capt. Sprye, and so that this court cannot permit that conveyance to stand. The conveyance was executed in pursuance or in consequence of an agreement contained in a letter of Sir T. Reynell, dated the 1st of June, 1843. By this letter Sir T. Reynell agrees to give up half the property to which he might be eventually found entitled, in consideration of his being indemnified against all costs whatever incurred in the attempt to recover it, whether that attempt should or should not prove successful.

[His lordship then read the material parts of the letter of the 29th of April, 1843.]

Looking, then, to this letter as the basis of the subsequent treaty, the question is, whether it contains any untrue statements calculated to mislead Sir T. Reynell, for if it does, and if they were known to Capt. Sprye to be inconsistent with truth, and were in any degree calculated to influence the mind of Sir T. Reynell, they will render invalid all the subsequent negotiations based on them. Now, after fully considering this part of the case, I feel bound to conclude that in this letter Capt. Sprye was misleading Sir T. Reynell on more than one point; he was misleading him on the subject of what he represents to be the usual course among men of business in conducting litigation, that is, that the parties for whose benefit it is conducted, should be indemnified from costs, and then should give up half the property recovered as a compensation or reward to the party carrying on the proceedings. Capt. Sprye distinctly states that this is the usual practice, and so states it as evidently to imply that it is both a lawful and an honorable practice. But though this is contrary to the fact, yet it may be said, perhaps, Capt. Sprye might have supposed he was only stating the truth. Let us see how that is. Capt. Sprye not only states the practice to be usual and impliedly honorable, but he says that he had mentioned it to a legal man, who had said he would, if Capt. Sprye's representations on the subject of Sir T. Reynell's rights were borne out by the documents, undertake the case legally "on the usual arrangement as above." I quote the very words. This amounts impliedly to a representation, first, that the person designated "a legal man" had represented the arrangement

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as usual; and, secondly, that he had undertaken to act on it. Who, then, was that legal man? Mr. Yonge was then Capt. Sprye's solicitor; and Capt. Sprye, in his first answer, says, that if Mr. Yonge was not the person referred to as the legal man, he does not know who it was. It is true that in the second answer, he says, he thinks the person intended as the legal man was his clerk, Mr. Mitchell; but that cannot be, for, in the first place, the legal man, according to the letter, had said that he would on certain contingencies undertake the case legally, that is, professionally; and this shows that the legal man must have been an attorney or solicitor, whereas Mr. Mitchell was a mere clerk or assistant to Capt. Sprye, aiding him in his genealogical inquiries — who could not, if he would, have conducted the case, professionally; and, secondly, the legal man is represented as having said that if he found what Capt. Sprye had stated to him was borne out by documents, he would undertake the case. This is altogether inapplicable to Mitchell. There were no documents except the will, and that had been communicated by Mitchell himself to Capt. Sprye, and, of course, therefore, was not a matter to be communicated by Capt. Sprye to Mitchell. Clearly, therefore, this allusion in the letter to a legal man, must have been altogether unfounded, or else it must have meant to represent that Mr. Yonge had agreed to undertake professionally the conduct of the law proceedings necessary for enabling Sir T. Reynell, or his heir, as the case might be, to obtain the property on the terms that he represented as the usual terms, namely, that Sir T. Reynell was to incur no costs, and that Mr. Yonge should, if the suit should be successful, receive one half of the property recovered by way of payment for his services; but that if nothing should be recovered, then he should himself bear all the costs. With such a representation, Sir T. Reynell, supposing him to place reliance on its accuracy, might well think that the most prudent plan for him to pursue would be to follow the course thus considered both by Capt. Sprye and Yonge to be the most fair and usual in similar cases, that is, to enter into the agreement contained in his letter of the 1st of June.

Let us now consider, whether on the evidence we can believe that Yonge had, in fact, made the statement to Capt. Sprye which the letter says he made; that is, did represent the proposed terms as being the usual mode of conducting litigation, and did offer himself to undertake the business on those terms. I cannot reconcile the hypothesis of any such proposal having been made by Yonge, with his letter to Capt. Sprye of the 12th of May. I will for the present treat that as the genuine letter of Yonge, and in it I find this passage: — "It appears you have already communicated to Sir T. Reynell that your informant considered himself entitled to half the property when recovered, after payment of all expenses, which, however, he was to defray if unsuccessful, and that he had afterwards generously offered that what he would thus have retained should be made over for the benefit of your wife and daughters. I am glad to find from Sir T. Reynell's note that this arrangement will be quite agreeable to him, but as life is uncertain, and to provide against any future misunder-



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standing, I agree with your friend in his suggestion, that before moving in this matter Sir T. Reynell should sign some legal document stipulating to the above effect. You on your part, at the same time binding yourself to indemnify him against any expenses whatever." Now, this is a representation materially different from that made in the letter of the 29th of April. The plain meaning of that letter was, that Mr. Yonge had undertaken, if satisfied with the documents, to run the risk of the litigation, looking to the eventual receipt of one half as his remuneration; whereas, according to Mr. Yonge's own letter of the 12th of May, he was to run no risk, he was to be employed professionally by the person described as the informant, who was to get half of what should be recovered, and then had agreed, after reimbursing himself his costs, to give it up to Capt. Sprye's wife and daughters. As far as Sir T. Reynell was concerned, it was of no consequence whether the half of the property recovered should go to Yonge or to any other person; but the discrepancy between the two statements is important, as showing that the letter of the 29th of April, on which the whole negotiation depended, contained representations not consistent with truth; representations calculated to make Sir T. Reynell believe that the proposed arrangement was one in the ordinary course of business, approved by Mr. Yonge, and on which he had himself offered to act. This could not have been an accidental misrepresentation — Capt. Sprye could not have supposed that Yonge had made the offer to conduct the litigation on the stated terms, if he had not done so; and he could not possibly have meant to describe Mr. Llewellyn as the legal man — and yet the plain inference from Yonge's letter is that Llewellyn, and not Yonge, was the party who was to get the half of the property, though he had agreed to give it up, after payment of the costs, to Capt. Sprye or his family.

But the deception on this head does not rest here. I have already alluded to Yonge's letter to Sprye of the 12th of May, and have supposed it to be the genuine letter of Yonge. In truth, however, it was no such thing. It was most important to Captain Sprye that Sir T. Reynell should consider the proposed arrangement as being the ordinary established mode of conducting litigation under similar circumstances. Captain Sprye told him that it was so — if the information so conveyed to Sir T. Reynell had rested wholly on the assurances of Captain Sprye, it was possible that Sir T. Reynell might inquire further on the subject — at all events the mind of Sir T. Reynell would be much more likely to acquiesce in the notion that the proposal was in conformity to ordinary usage if he was informed by some professional person that such was the case, than if the whole rested on the representation of Capt. Sprye alone; it was, therefore, most important to Capt. Sprye that he should be able to put into the hand of Sir T. Reynell some document which should lead him to suppose that Yonge viewed this proposed arrangement in the same light in which it had been represented by Capt. Sprye himself in the letter of the 29th of April, that is, as an arrangement such as honorable men were accustomed to act on, and the letter written by

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Yonge to Capt. Sprye on the 12th of May was exactly calculated to have that effect; for he there, in the passage to which I have already referred, alludes to the proposed arrangement as to dividing the property without making any comment on it as being unusual or illegal, and only expresses admiration at the generous way in which the informant had agreed to forego his share, after payment of the expenses, in favor of Capt. Sprye's wife and children. So, again, he approves of the suggestion said to have been made by Capt. Sprye's friend, that the parties should bind themselves by some legal document, in order to guard against the contingencies of life and death. This letter was forwarded on the 15th of May by Capt. Sprye to Sir T. Reynell, and its effect on his mind (assuming him to have treated it, and no doubt he did treat it, as a genuine letter of Yonge) must have been to make him think that the transaction was, in the opinion of Yonge, one of ordinary occurrence, or differing only from the usual course of such transactions, in the generosity which as between the informant and Capt. Sprye, had led the former to forego his share of the property in favor of Capt. Sprye or his family. This would, I say, necessarily be the effect of such a letter on the mind of Sir T. Reynell, supposing him to treat it as the genuine letter of Yonge. It could have no such effect, or at all events much less effect, if Sir T. Reynell had known that it was in truth not the letter of Yonge, but a letter prepared under the directions of Capt. Sprye himself, for the purpose of being shown to Sir T. Reynell as being the letter of Mr. Yonge; and such, I conceive, it certainly was. Capt. Sprye incloses it to Sir T. Reynell in his letter of the 15th of May, merely describing it as "a note from my legal friend." Let us see, then, how and under what circumstances it was written. Capt. Sprye, in his first answer, says, that having obtained a copy of the will of H. Reynell, he, on the 9th of May, had a conference with Mr. Yonge thereon, and on the proposed arrangement for remuneration; whereupon Yonge said he would consider the matter and write his opinion to Capt. Sprye, in order that he might submit it to Sir T. Reynell, and the letter of the 12th of May was accordingly written. If this had been a full and fair representation of the whole which had passed between Capt. Sprye and Mr. Yonge, I do not think that Sir T. Reynell would have anything to complain of so far as relates to this part of the case; but it appears from Capt. Sprye's second answer, when he had been further pressed on the subject, that what he had stated in his first answer by no means fairly represents the truth of the case. The fair inference from the first answer is, that the letter of the 12th of May was the genuine unprompted production of Yonge, whereas from the subsequent answer it is apparent that what Mr. Yonge then wrote had been, in truth, suggested by Capt. Sprye himself. He denies, indeed, in answer to the charge in the amended bill, that he dictated or settled the draft of the letter of the 12th of May, but he admits that he communicated to Yonge an outline or sketch of the letter that he should write. It is enough to say that a letter so written is a very different thing from a letter containing the spontaneous suggestions of the writer's own mind; the latter might well create impressions which the former

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would fail to produce; and when Capt. Sprye forwarded Mr. Yonge's letter under circumstances which necessarily implied that it had originated with Yonge himself, he was misleading Sir T. Reynell in an important particular. It had the same effect as if he had said, "do not trust to me, you see in what light Yonge views the matter, act upon that." We have thus a negotiation opened between Capt. Sprye and Sir T. Reynell, founded on what I consider to have been misrepresentation, necessarily leading Sir T. Reynell to believe that the basis on which Capt. Sprye proposed to conduct the litigation for the benefit of Sir T. Reynell, was fair and usual, and that in the ordinary intercourse between Capt. Sprye and his solicitor, the latter had so treated and was ready to act on it. Putting, then, this construction on what had passed between the parties, I am of opinion that the original negotiation was founded on what must be treated in this court as a fraudulent misrepresentation; and that for however long a time the negotiation afterwards continued, and into whatever ramifications it afterwards extended, the original vice continued to taint it, and that Capt. Sprye can never claim the benefit of any deed or instrument founded on it.

In these remarks I have proceeded on the assumption, that the impeached deed was, in fact, founded on the previous letters to which I have adverted. It is, I think, impossible to come to any other conclusion. I am aware that the terms of the conveyance, as it was eventually executed, differ in several material particulars from those originally contemplated, but the circumstances of the case satisfy me that Sir T. Reynell, though probably not unaware, to some extent, of the change made in the form of the deeds, yet executed them in the full belief that he was substantially carrying into effect the proposal originally made to him. I do not pursue this part of the case, which my learned brother has so fully investigated. This, then, being my opinion; being, as I am, satisfied that Sir T. Reynell was induced to execute the impeached deed on the representation that the proposal to divide the produce of the litigation was one emanating from Yonge, and on which he had been ready and had offered to act, it would perhaps be enough for me to leave the case here; for where a party has induced another to act on the faith of several representations made to him, any one of which he has made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made. But I felt it my duty to follow this inquiry further, lest I may have taken too strong an impression from the single point to which I have yet adverted. [His lordship then read copious extracts from Sprye's answers, giving his version of the transaction and many of the letters in the correspondence, and which his lordship stated that he disbelieved.] I assume, that at the same time when the negotiation was opened and for several weeks afterwards, Capt. Sprye fully believed that Sir T. Reynell would take no interest himself, unless he survived the tenant for life; it was, therefore, no fraud in him to represent to Sir T. Reynell that the nature and extent of his interest were such as he supposed them to be. But having made such a representation, and knowing that Sir T. Reynell was negotiating on the footing of his interest being such as it

had been represented to him, Capt. Sprye was, on the most obvious principles of justice and fair dealing, bound, as soon as he discovered his mistake, as soon as he found that the interest of Sir T. Reynell was much more valuable than he had described it, to explain the mistake to Sir T. Reynell, so as to enable him, if he should think fit, to put an end to the pending treaty. That this was not done is, I think, apparent from all the circumstances of the case. Mr. Stinton's opinion, which was obtained on the 15th of June, stated, as of course it must state, that Sir T. Reynell had a vested remainder in fee expectant on the life estate of Mrs. Williams Reynell, and subject to certain contingent estates known by all parties to be interests which might practically be disregarded as being of no value whatever. I may say, that I have disregarded the circumstances of the supposed life estate of the husband of Mrs. Williams Reynell, that would only remove the title one step further, but the truth is, as it turned out, there was no such title. I have treated it as if that never came in question. Capt. Sprye says, in his first answer, that this opinion was communicated to him on the 16th of June, and that he was then for the first time informed what the interest of Sir T. Reynell in the estate was. In his second answer, he says, a copy of the opinion was sent to him, unaccompanied by any note or other memorandum, and he denies that he then fully understood the nature of Sir T. Reynell's rights. This denial, it will be observed, is made in very guarded terms; he only says that he did not then fully understand what Sir T. Reynell's rights were, but in his former answer he had said that he was then first informed of what the interest of Sir T. Reynell was.

Now, taking the two answers together, the fair and reasonable inference appears to me to be, that Capt. Sprye at this time, by means of the opinion of Mr. Stinton, had at least ascertained that the interest of Sir T. Reynell was far more valuable than it had been originally supposed to be, and so that he had led Sir T. Reynell into a treaty on an erroneous view as to his rights. Under these circumstances, it was the bounden duty of Capt. Sprye immediately to put Sir T. Reynell on his guard, to explain to him that he had up to that time unintentionally misled him as to his rights, that consequently he was free to disregard all that had been done up to that time as having been founded in error. Did he do this? Nothing of the sort. On the contrary, I find that on the 16th of June, after he had got the copy of Mr. Stinton's opinion, he wrote a long letter dated on that day at 10 o'clock p. m. to Sir T. Reynell, in which he does not even state that the opinion had been obtained; he says, indeed, that he has had on his desk for some time the case which had been submitted to counsel, hoping that he, Sir T. Reynell, would look in and see it. But this could hardly have been the case with the opinion, for what had been sent to him was, as he states, merely a copy of the opinion. At all events, though he writes a long letter, many passages in which satisfy me that he had then seen the opinion, and, to a great extent, understood its import, yet he does not give any hint to Sir T. Reynell as to how much more beneficial an interest he possessed according to the opinion that had been originally represented by Capt. Sprye in the letter

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of the 29th of April. I cannot but consider the omission, immediately and at once to call Sir T. Reynell's attention to the effect of the opinion, as affording very cogent evidence that he never intended to set him right as to the real nature of his interests. If he did not at once put him on his guard when he wrote to him at great length as soon as he got the opinion, what reason is there for supposing he would do so afterwards? I can discover none. There is no evidence of his having done so. The probability, as he did not do so at first, is, that he would not do so afterwards, and I think that in the subsequent correspondence I discover satisfactory, I might say irresistible, proof that no such communication ever was made to him. [His lordship then referred to the proceedings in chancery and Sprye's letters relating to them, and then read such other parts as related to the alleged difficulties in the case, and the effect on Sir T. Reynell's mind as shown in the letter of the 11th of May, 1844.]

Let us here pause and consider what is the necessary inference from these letters. The problem to be solved is this: — Did Capt. Sprye before he obtained the conveyance of the 15th of July, 1843, explain to Sir T. Reynell that in his former letter he had made to him an erroneous representation as to his rights; had represented that to be contingent and precarious which he had since discovered to be vested and certain — had led him to suppose that the benefits possibly to accrue to him, could only be recovered through the means of expensive legal proceedings of doubtful result; whereas, in fact, he would, on the death, without issue, of Mrs. Williams Reynell, succeed entirely and without any law proceedings at all to the whole of the property? This I say is the question to be solved — and surely there can be no doubt as to the answer. The letter of the 11th of May, which I have just read, is absolutely irreconcilable with the notion that Sir T. Reynell was aware of the real nature of his rights. There is no meaning in the passage about his being ready to withdraw when Capt. Sprye should find there was no further hope of success, if we are to believe that he knew the property would regularly, without any litigation or controversy, devolve on him when Mrs. W. Reynell should die. The letter is well consistent with the hypothesis that Capt. Sprye allowed Sir T. Reynell to proceed all along on the notion that his rights were such as he, Capt. Sprye, had originally represented them — it is irreconcilable with the supposition that he had at any time explained to him the real nature of these rights. It only remains to add, that on receiving this last letter, Capt. Sprye still keeps up the same delusion which he had previously created. Instead of saying, as he was bound to do, "What do you mean by hope of success? There is no doubt or difficulty on the subject — it is quite certain that when Mrs. Williams Reynell dies, we shall succeed to the estate, that is to say, you to one half and I to the other." Instead of saying this, or to this effect, he keeps up the delusion, treats the offer made by Sir T. Reynell to drop the proceedings, as a friendly proposal, but to which he could not listen, not because it was (as in truth it was) absurd and founded on ignorance of the real nature of his interests, but because he, Capt. Sprye, "was not of

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a turn or temper of mind accustomed to yield to difficulties!" On these grounds then I come to the conclusion, that some time before the execution of the conveyance, probably on the 16th of June, Capt. Sprye ascertained that Sir T. Reynell had an absolute indefeasible interest in the property in question, to recover which, no legal proceedings whatever would be necessary, and that he nevertheless kept Sir T. Reynell in ignorance of what he had so found out, and allowed him to proceed on the erroneous notion of his rights, as they had been originally represented by the letter of the 29th of April, and those which immediately followed. I have thus arrived at the conviction, that in three distinct respects, Capt. Sprye misled Sir T. Reynell in the treaty which ultimately led to the execution of the deed of conveyance of the 15th of July, 1843; first, by representing to him that the proposal to share the property was one usual among men of character, and one on which Mr. Yonge had proposed to act; secondly, by leading him to believe that the benefits to be obtained for him or his heir, could only be so obtained, if at all, through the medium of a doubtful and costly litigation; and, thirdly, by not explaining to him, after Mr. Stinton's opinion had been obtained, that his interest was not contingent as he had originally described it, but an absolute indefeasible interest subject only to the chance of Mrs. Williams Reynell leaving issue.

Every one of these considerations would be material ingredients towards enabling Sir T. Reynell to form his judgment as to whether he should or should not accede to the proposal of Capt. Sprye. If he had not received what was equivalent to an assurance that Mr. Yonge considered the proposed division of the property as the usual course of conducting business on such occasions, and if he had not been led to suppose that his interest was contingent, depending on the chance of his surviving Mrs. Williams Reynell; and then only to be recovered by expensive and doubtful litigation, it may well be that he would not have acted as he did;—perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been anything like deception, intentional deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyze the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution or the adoption of any particular line of conduct. No one can really do this with certainty, even as to himself, still less as to another. Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed, to adopt a particular line of conduct, it is impossible to say of any one such representation so made, that even if it had not been made, the same resolution would have been taken or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue and known to the party so to be, the whole contract is in this court considered as having been obtained fraudulently. Who

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can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may, in the first instance, have been the result of innocent error. If, after the error has been discovered, the party who has innocently made the incorrect representation, suffers the other party to continue in error and act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this court, a fraudulent misrepresentation even though it was not so originally.

These are all principles of such obvious justice as to require neither argument nor authority to illustrate or enforce them, and they need but to be stated, in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle? I have already pointed out several particulars in which I think these principles apply to the present case; and, therefore, without inquiring whether there are or are not other instances of misrepresentation fatal to the case of Capt. Sprye, I feel bound to say, that I concur with Sir James Wigram in his conclusion, that the conveyance of the 15th July was obtained by fraud, and so must be set aside.

It would not be right that I should leave unnoticed an argument much pressed at the bar, and which carries with it a semblance of justice, but to which I have not felt it possible to yield my assent. It was said that during the whole of the negotiations Capt. Sprye not only left Sir Thomas Reynell at perfect liberty to consult his friends and professional advisers, but even on several occasions recommended him to do so. To a great extent this certainly was the case; and if the relief sought in this suit had rested on mere mistake, if Capt. Sprye had not by misrepresentations of facts, which I cannot treat as unintentional, led Sir T. Reynell to believe that his rights were different from what in truth they were, it may be that the argument to which I am now adverting would have prevailed. In such a case, perhaps, this court might have considered that it was the folly of Sir T. Reynell to have acted without advice, and might have refused to assist any person who was so singularly little alive to his own rights. *Qui vult decipi, it is said, decipiatur.* But no such question can arise in a case like the present, where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be. In such a case it is no answer to the charge of imputed fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. For no man can complain that another has too implicitly relied on the truth of what he has himself stated. This principle was fully recognized in the case of *Dobell v. Stevens*, 3 B. & C. 525; s. c. 3 Law J. Rep. K. B. 89, referred to by my learned brother in the course of the argument.

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The reasoning by which I have satisfied myself of the plaintiff's right to set aside the conveyance, also disposes of that part of the bill of Sir T. Reynell, in which he seeks to have the contract for the purchase of the other moiety delivered up and cancelled, and also of the cross suit. For, independently of all other objections to that contract, it is clear Capt. Sprye having, by what I must consider as fraud, put Sir T. Reynell in the position of being the owner of a moiety instead of the entirety, could never deal for the purchase of that moiety. Such dealing is, in truth, but a continuation of the original fraud; and on that short ground I am clearly of opinion that the contract of the 14th of May, 1844, must be considered as having been obtained by fraud, and must be delivered up to be cancelled, and that the cross bill filed for the purpose of enforcing a specific performance of that contract was properly dismissed, with costs. My learned brother has pointed out some trifling additions which ought to be made in the decree, but this does not go to the substance of the case; and we both, therefore, concur in the opinion that the costs of this rehearing must be borne by Capt. Sprye.

The decree was then added to by ordering an injunction against Sprye from bringing any action or proceedings at law against Lady Elizabeth as executrix or devisee of Sir Thomas, upon or in respect of the two instruments declared by the decree to be void, and the counsel for Lady Elizabeth gave for her an undertaking that she would abide by any order the court might make concerning the deed of indemnity.

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 SPRYE v. REYNELL.<sup>1</sup>

March 25 and 26, 1852.

*Costs—Stay of Proceedings—Waiver—Supplemental Bill in the nature of a Bill of Review.*

A party was ordered to pay the general costs of certain suits. Pending an appeal, he moved for leave to file a supplemental bill in the nature of a bill of review, and obtained leave to do so on depositing 50*l.* with the registrar, and he was ordered to pay the costs of the motion. He paid the 50*l.*, but not the costs of the motion, and filed a supplemental bill; but the court held that the payment of the costs of the motion was a condition annexed to the order giving leave to file the supplemental bill, and that therefore all proceedings in the supplemental suit must be stayed until payment of them.

Where a party is ordered to pay the general costs of a suit, and also the costs of a particular motion, and then files a bill against the party entitled to all those costs, if the latter moves to stay all proceedings in the new suit until the costs of the particular motion are paid, that is a waiver of any right he may have to stay proceedings until the general costs of the suit are paid, and the court will only stay the proceedings until payment of the costs of the particular motion.

By a decree, dated the 6th of November, 1849, in the causes of

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 664.



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*Reynell v. Sprye* and *Sprye v. Reynell*,<sup>1</sup> the defendant in the first and the plaintiff in the second suit, Richard Samuel Mare Sprye, was ordered to pay the costs of Lady Elizabeth Reynell, one of the parties to those suits. This decree was appealed from, and before the hearing of it, Mr. Sprye moved, on the 20th of November, 1851, against that lady and her solicitors, Messrs. Walker & Grant, for the production of documents, and for leave to file a supplemental bill in the nature of a bill of review; whereupon it was ordered that the motion for production be refused with costs, but leave was given to file the bill upon Mr. Sprye depositing 50*l.* with the registrar, to answer costs, in case the court should think fit to award costs in respect of the proceedings had since the decree, and Mr. Sprye was ordered to pay the costs of the application, and the hearing of the appeal was stayed. The decree was ultimately affirmed, the appeal being dismissed with costs. On the 15th of January, 1852, Mr. Sprye having deposited the 50*l.*, filed his supplemental bill in the nature of a bill of review, against Lady Elizabeth Reynell, Mr. Lawrence Walker, Mr. Arthur Walker, (two of the firm of solicitors of Walker, Grant & Co.) and Mr. Charles Wilson; and appearances were entered on the 19th of the same month. The costs ordered to be paid by the decree of the 6th of November, 1849, not having been paid, an attachment was issued against Mr. Sprye, and a similar proceeding was taken against him for non-payment of the costs given by the order of the 20th of November, 1851. An application was made on the 1st of March, 1852, to the Master, in the supplemental suit, on behalf of Lady Elizabeth and Mr. Lawrence Walker, and Mr. Arthur Walker, that the time for their answering might be enlarged for six weeks after Mr. Sprye should have paid the costs directed by the order of the 20th of November, 1851. On the following day, a motion was made on behalf of the same parties before Vice-Chancellor Parker, that all proceedings against them for want of answer, might be stayed until four weeks after the plaintiff, Mr. Sprye, should have paid to them the costs directed to be paid by him, by the order of the 20th of November, 1851, giving him leave to file the new bill, and for non-payment of which he was then in contempt, or in case the court should not think fit so to order, then that the said defendants might have four weeks further time to answer. The Vice-Chancellor made an order, giving the four weeks further time, without prejudice to an application to stay the proceedings in the suit. On the 8th of March, a motion was made before Vice-Chancellor Parker in the same suit, and on behalf of the said parties, that all proceedings in that cause against the defendants, Lady Elizabeth Reynell, and Lawrence Walker, and Arthur Walker, for want of their answers, might be stayed until three weeks after Mr. Sprye should have paid to the three defendants the costs directed to be paid by him by the order in the suits of *Reynell v. Sprye* and *Sprye v. Reynell*, dated the 20th of November, 1851, and should have

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<sup>1</sup> These causes are reported on minor points, 16 Law J. Rep. (N. S.) Chanc. 117, 286, and 21 Law J. Rep. (N. S.) Chanc. 13; s. c. 8 Eng. Rep. 35. The case upon appeal will be found 21 Law J. Rep. (N. S.) Chanc. 633; s. c. *ante*, p. 74.

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cleared his contempt; and that all proceedings in this cause against Lady Elizabeth Reynell for want of an answer might be stayed until three weeks after the said plaintiff should have paid not only the said costs, but also other costs in the said suits of *Reynell v. Sprye* and *Sprye v. Reynell*, for non-payment of which to the said Lady Elizabeth Reynell, he was then in contempt, and should have cleared his contempt. The Vice-Chancellor held that as the court had given Mr. Sprye, by the order of the 20th of November, 1851, liberty to file the new bill, on a condition which he had fulfilled, namely, the payment of the 50*l.* to the registrar, the motion must be refused with costs. His honor stated his opinion to be, that the payment of the costs was not made a condition precedent, to be performed before the filing of the bill. From this order Lady Elizabeth Reynell, Mr. Lawrence Walker, and Mr. Arthur Walker appealed.

*Lloyd, Malins, and Shapter*, for the appeal. The only rational construction, having regard to the uniform practice of the court, of the order of the 20th of November, 1851, by which leave was given to Mr. Sprye to file his supplemental bill in the nature of a bill of review, is, that he was required to pay the costs before he should file that bill. That was a condition precedent, imposed by the court as the term of such indulgence being granted. He has not performed that condition; and the case of *Partridge v. Usborne*, 5 Russ. 195; s. c. 7 Law J. Rep. Chanc. 49, is explicit to show that, unless under very special circumstances, which do not occur here, a party will not be allowed to prosecute a supplemental bill in the nature of a bill of review unless he performs at the proper time all that the decree commands him to do. In that case the time for the payment of money had not arrived, but here it has; and there Lord Lyndhurst said that if the money were not paid when the period should arrive, or if it turned out upon inquiry that a period had arrived, and an application were made founded on the default, that would lead him to a different conclusion from that which he had arrived at. The rule is laid down very clearly in the third and fourth of *Lord Bacon's Orders*.<sup>1</sup> In *Wilson v. Bates*, 3 Myl. & Cr. 197; s. c. 7 Law J. Rep. (N. S.) Chanc. 131, before Lord Cottenham, the practice that proceedings will be stayed until costs are paid, is fully recognized, and more especially in *Price v. Dalton*, cited in page 204 of the same reports, where it is stated "Upon a motion by the defendant that all proceedings for want of answer might be stayed until the plaintiff had paid certain costs, the court gave the defendant three weeks time to answer, after

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<sup>1</sup> Beames's Orders, 3—"No bill of review shall be admitted, or any other new bill, to change matter decreed, except the decree be first obeyed and performed; as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguisheth the party's right at the common law—as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like,—those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court."

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the costs should have been paid." In a much more recent case, decided by one of your lordships when Vice-Chancellor, and sitting for Sir James Wigram, *Bradbury v. Shawe*, 14 Jurist, 1042, and in which *Wilson v. Bates* was cited, an order was made staying all proceedings until the plaintiff should have cleared his contempt by the payment of the costs.

[KNIGHT BRUCE L. J. From the report, it is plain that I made the order with great reluctance, under pressure, as it were, of *Wilson v. Bates*. The order was made, also, very near August.]

*Bethell* and *Terrell*, for Capt. *Sprye*, argued that there was no sufficient reason stated why proceedings should be stayed. Besides the doubt entertained by one of their lordships, as stated in *Bradbury v. Shawe*, of the soundness of *Wilson v. Bates*, the late Sir Lancelot Shadwell in *Bickford v. Skewes*, 10 Sim. 193, refused a motion that a trial should be postponed until a defendant should have cleared his contempt of the non-payment of costs. There *Wilson v. Bates* and *Price v. Dalton* were both cited, and his honor said that, although the cases cited afforded some countenance for the application, he could not think they warranted it; and he should therefore refuse the motion with costs. The case of *King v. Bryant*, 3 Myl. & Cr. 191; s. c. 7 Law J. Rep. (n. s.) Chanc. 167, was also cited.

LORD JUSTICE KNIGHT BRUCE. This motion divides itself into two parts, namely, the general costs of the two suits of *Reynell v. Sprye* and *Sprye v. Reynell* in which a decree has been made, and the costs of the motion in the month of November last. As to the costs of the motion in the month of November last, my original impression was against Lady Elizabeth Reynell and Messrs. Walker, Grant & Co., or at least against the latter; but the progress of the argument has changed that impression. The motion was made in a cause in which Lady Elizabeth Reynell was a party, and it relates to the subject-matter of that cause. It desired the production of certain documents for the purpose of an application for a rehearing, pending an appeal in that cause. It, moreover, asked leave to file after the decree a supplemental bill, and it made parties to that motion four gentlemen, describing them by the names of Messrs. Walker, Grant & Co. The court on that occasion adjudicated without any consent, I believe, as to that part of it, that Captain *Sprye*, who made the motion, should pay the costs of it, that is, the costs of Lady Elizabeth Reynell and of these gentlemen, and that direction formed part of an order which gave leave to him to file the present bill. The consequence is, that these costs not being paid, the condition annexed to that order has not been fulfilled. The order which gave leave to file a supplemental bill in the nature of a bill of review, although it also asks in the alternative, or otherwise, to set aside the decree upon the ground of alleged fraud, not being complied with, my learned brother and myself are of opinion that, as the subjects are so intimately connected together by the means which I have mentioned, there is a right on the part of Lady Elizabeth Reynell, and on the part of two of the

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solicitors whom I have mentioned, who have been made parties to the present bill, to stay the proceedings under the present bill until those particular costs have been paid; namely, the costs given to Lady Elizabeth Reynell and to Messrs. Walker, Grant & Co., by the order of the 20th of November, 1851. Nothing has taken place to waive the right to the payment of those costs, for they have been claimed on every occasion. As I understand, they were claimed before the Master, and they were claimed by the application made to the Vice-Chancellor, Sir James Parker, for the order; I mean that the costs were claimed by the motion under which Sir James Parker made the order now appealed from, and the right to which is reserved by that order. With respect, however, to the general costs of the suits *Reynell v. Sprye* and *Sprye v. Reynell*, in which the decree was made, it is arguable whether a case of waiver has been established or not, and therefore as to that fact the court would hear a reply.

LORD CRANWORTH, L. J. What my learned brother has said represents precisely the view I take of this matter.

*Lloyd* replied upon the question of waiver, and contended that although the original application did not in express terms add the costs of the suit, still it must be considered, that so far as they were concerned, the appellants relied on the well-known practice of the court, so as to exclude the notion of a waiver of any part of their rights.

LORD CRANWORTH, L. J. My learned brother and myself are both of opinion, that with respect to these costs, that is, the general costs of the suit, excluding the costs of the order of the 20th of November last, there has been that which amounts to a waiver on the part of Mr. Lloyd's clients; and for this reason, which may be reduced to a very simple form; suppose the application for time had been an application having no reservation at all; suppose it to have been not four weeks after any particular act to be done, but simply four weeks' further time to answer, that would have been a waiver of any right to stay the proceedings; that is not disputed. Now, what is applied for is four weeks after the particular act is done; that is not an absolute waiver, it is no waiver on that particular act being done; but that particular act being done, the application is the same as if it had been an application for time, there being no restriction. That is the view we take of it, and, therefore, the motion will be refused so far; that is, we think that the motion ought to be granted with reference to the costs of the motion of the 20th of November last, and refused as to the more extended application. The appeal will be partly granted and partly refused. The proper course will be that the order should be made without any costs in the court below, and no costs now. All proceedings against Lady Elizabeth Reynell and the Messrs. Walker will be stayed until three weeks after the plaintiff shall have paid the costs given by the order of the 20th of November last; and let the order of the Vice-Chancellor be varied accordingly.

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**KNIGHT BRUCE, L. J.** On the ground of waiver we decline to stop the proceedings in this suit in the nature of a supplemental suit, until the costs in the other suits mentioned in the order of the 20th of November are paid. No costs on either side.

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**MILES v. DURNFORD; DURNFORD v. WOOD.<sup>1</sup>**

March 22 and July 2, 1852.

*Mortgage — Executor — Parties.*

An executor borrowed money upon a representation that it was wanted for the purposes of his testator's estate. The money was lent upon the personal security of the executor, who afterwards mortgaged part of the testator's property as a security for the money antecedently advanced:—

*Held*, by the Vice-Chancellor, that the onus of proof lay on the person who advanced the money, to show that it was applied for executorship purposes: but

*Held*, on appeal, that there was no evidence to show that the advances were not made for executorship purposes; and the bill was dismissed.

The plaintiff was the representative not only of the executor, who had borrowed the money, but also of the original testator, and in the latter character he sought to impeach the mortgage:—

*Held*, by the Vice-Chancellor, that the plaintiff, although he was executor of the original testator, in which character he might sue, could not repudiate the character of representative to the executor, who could not sue: but

*Held*, contra, on appeal.

THE bill stated, that John Punter, the elder, was possessed, amongst other property, of three leasehold houses in Earl Street, Lisson Grove. That by his will, dated in January, 1846, he gave all his property, including these three houses, to his son, John Punter, on trust, to pay his debts, and also a mortgage on the three houses in Lisson Grove, if it should be still subsisting at his death; and subject to the payment of debts, &c., the property was to be equally divided between John Punter, his son, and his brothers and sisters.

The testator appointed his son sole executor of his will, but declared that if he should die in the lifetime of the plaintiff, John Miles, then, after the decease of his said son, the testator appointed the plaintiff his sole executor. Upon the death of the testator, in May, 1846, his will was proved by John Punter, the son, who died in September, 1849, intestate, and thereupon probate of the testator's will was granted to the plaintiff, who also took out letters of administration to the son. The bill stated that the residuary personal estate of the testator possessed and received by his son John Punter was far more than sufficient to pay his funeral and testamentary expenses,

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 667.

including the mortgage debt on the three houses in Earl Street, Lisson Grove.

The plaintiff then alleged that the said three houses of the testator in Lisson Grove were advertised for sale at the instance of the defendant, Elizabeth Durnford, who claimed to be entitled thereto as the mortgagee thereof, under a mortgage with a power of sale, executed to her by the said John Punter, the son, and purporting to bear date the 14th of April, 1849. That in such mortgage it was recited, that upon the application and request of the said John Punter, the son, the said defendant, Elizabeth Durnford, had, at divers times between the month of October, 1846, and February, 1848, advanced and lent to the said John Punter, the son, several sums of money, amounting together to the sum of 600*l.*, and that the sum of 350*l.*, part of the said sum of 600*l.*, was so advanced and lent to the said John Punter, the son, for the purpose of enabling him as such executor as aforesaid to pay off and discharge a certain mortgage debt of 250*l.* and interest, to Henry Smart, charged upon the said three houses in Lisson Grove, and also to pay certain charges which the said John Punter, the son, had incurred as such executor, in and about the said testator's estate, and that the said Elizabeth Durnford had taken other security for the remainder of the said sum of 600*l.*, and that there was then due from the said J. Punter, the son, as such executor, to the said Elizabeth Durnford, in respect of the said sum of 350*l.* and the interest thereon, the sum of 370*l.* And that the said J. Punter, the son, not being able to pay the said sum of 370*l.*, had proposed and agreed to execute to the defendant a mortgage of the said three houses, for securing repayment of the said sum of 370*l.* with interest thereon in manner thereafter mentioned.

The bill then set forth the mortgage made in pursuance of this recital, which contained, amongst other usual clauses, a power of sale given to the defendant upon her giving three calendar months' notice of her intention to the said J. Punter, the son, or the executor for the time being of the testator. The bill alleged that the defendant did not give to the said J. Punter, the son, and had not given to the plaintiff the notice required by the mortgage deed; that the debts due and owing by the testator, J. Punter, at his decease, were very few and trifling, but that at the time of the execution of the said mortgage there was a large sum of money due and owing from J. Punter, the son, to the estate of his father, and that J. Punter, the son, borrowed the whole of the sum of 600*l.* mentioned in the mortgage from the defendant to answer his own occasions, and not for the purpose of discharging any debts of the testator, or of paying any charges incurred in and about the estate of the testator, and that at the time the said J. Punter, the son, executed the said mortgage to the defendant, she well knew, or had good reason to suspect, that he had borrowed the whole of the said sum of 600*l.* for his own occasions, and not for the purpose of paying any debts of the testator, or any charges incurred by J. Punter, the son, in and about the estate of the testator.

The bill charged that the said sum of 600*l.* was lent by the defendant to J. Punter, the son, in six different sums, and at different

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times, upon his personal security, and that at the respective times of such loans being made, the said defendant did not know, and had not any reason to believe or suspect that the said J. Punter, the son, was the executor of his father, and that the said several sums of money were lent and advanced by the defendant upon the belief that they were lent for his own purposes, and she treated such several sums as his private debts. That under these circumstances the defendant was bound to inquire and ascertain whether any part of the said sum of 600*l.* had been required or expended by the said J. Punter, the son, for or in paying any charge incurred by him as the executor of his father.

The bill further alleged that shortly after the several advances were made by the defendant to John Punter, and on the 30th of October, 1848, the said J. Punter deposited some of the deeds relating to the testator's estate with the defendant by way of security for the sums so advanced, and that this equitable mortgage was made for the whole sum of 600*l.*, and the defendant had filed a bill in this court against the said J. Punter for the purpose of compelling payment of the money, or a sale of the property. The bill prayed an injunction to restrain the sale of the three houses, and that it might be declared that the before-mentioned mortgage executed by J. Punter, the son, was not a valid mortgage, and that such mortgage did not in any manner affect the estate of the testator, or any part thereof, or the said three houses in Lisson Grove, and that the defendant might be ordered to deliver up the mortgage to be cancelled.

There was a cross-bill filed by Mrs. Durnford, praying that a subsequent mortgage to a Mr. Wood might be declared fraudulent and void, or, at all events, postponed to her mortgage, and that the mortgage to Mrs. Durnford might be redeemed.

During the progress of this suit a motion for an injunction was made, which was submitted to.

*Stuart and Nalder* appeared for the plaintiff, and contended that there was nothing to show that the money had been advanced for executorship purposes. It was advanced in small sums to the executor, J. Punter, without any security being taken. After the last advance, an equitable mortgage by deposit of deeds was created; but it was not until the defendant attempted to enforce payment of the money that the mortgage now set up by the defendant was made. There were, at any rate, circumstances of suspicion sufficient to entitle the plaintiff to an inquiry whether any of the advances were made to J. Punter in his character of executor. *M'Leod v. Drummond*, 14 Ves. 353; *Keane v. Roberts*, 4 Madd. 332, were cited.

*Willcock and Giffard*, for the defendant, submitted that it was to be presumed the executor obtained the money for the purpose of his testator's estate, as alleged upon the mortgage, unless the contrary could be shown. The plaintiff was bound by the recitals in the mortgage deed. The defendant had no means of knowing that the executor was not dealing honestly, and there was no allegation that she was

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in the position of a party colluding with the executor when she took the mortgage. It was requisite that the executor should go forth to the world as a person accredited by the testator. If an inference could be drawn from all the circumstances, that the money was lent for the executor's personal use, then, no doubt, it would be impossible to enforce the mortgage; but there was no rule whatever that the money was to be considered as advanced for personal use, merely because it was lent before any security was given. It was held, upon all the authorities, that a person lending money to an executor was not bound to see to the application of it; *Watkins v. Cheek*, 2 Sim. & S. 199; *Eland v. Eland*, 1 Beav. 235; s. c. 4 Myl. & Cr. 420; 8 Law J. Rep. (N. S.) Chanc. 289; and *Griffith v. Vanheythuysen*, 9 Hare, 85; s. c. 4 Eng. Rep. 25. There was another objection in this case, that the plaintiff had no power to sue. He was, no doubt, the representative of the original testator, J. Punter the father, but he was also the representative of John Punter the younger, the person who had executed this deed, and in the latter character the plaintiff could not sue to set aside the mortgage.

*Stuart*, in reply, said, the plaintiff could not be precluded from protecting the estate of the original testator from his merely happening to fill the character also of representative of the person who had committed the fault. The plaintiff was suing exclusively in his character of executor to the original testator, and not as administrator to the son, and this course he was bound to take for the protection of the estate.

KINDERSLEY, V. C. The testator died in May, 1846, and his son, John Punter the younger, was appointed executor, and proved the will. At different periods between the 14th of October, 1846, and February, 1848, John Punter borrowed from Mrs. Durnford sums of money, generally 100*l.* at a time, representing that he wanted them for executorship purposes, and she lent him those sums up to 600*l.*, the last advance being in February, 1848. It appears that the testator owed to a person named Smart, the sum of 250*l.*, and he wanting payment, a sum of 50*l.* was paid in 1847, and the rest of the money was paid on the 2d of February, 1848, which was after the 260*l.* was borrowed from Mrs. Durnford by Punter. It does not appear that at the time these advances were made to Punter there was any agreement to give security for them. The effect of the advances when made was this, that they were advanced on private security of Punter himself, and not giving any lien on the testator's property; and any remedy which Mrs. Durnford might have sought to enforce was only against Punter individually, and not as executor. They were made to him alone, though they might have been for executorship purposes, and if all had been paid for the benefit of the testator's estate, still the loan to him was personal, there being no agreement as to any mortgage or security on the testator's assets, at the time the advances were made. On the 30th of October, 1848, which was after the last advance was made, Punter deposited the deeds of the leasehold



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property of the testator with Mrs. Durnford, by way of securing the money advanced to him, and that equitable mortgage seemed to have been as a security for the whole. I see no reason for supposing that the mortgage was for less than the whole amount of the advances. That equitable mortgage having been given in 1848, in February, 1849, Mrs. Durnford attempted to enforce payment of the security, and a common equitable mortgagee's bill was filed. The transaction is there treated as the private transaction of Punter. There was nothing said about its being to Punter, in the character of executor to his father. On the other hand, I do not see that there was any necessity for that, as between Mrs. Durnford and Punter, as for the purpose of a mortgage or sale it was not necessary to make such a case on that bill. The bill treated it as a private transaction; but in consequence of that bill, shortly afterwards, in April, 1849, Punter executed an actual mortgage deed to Mrs. Durnford for securing, not the whole 600*l.* but only 370*l.*, and the recitals were in this shape:— It was stated that on the application and request of J. Punter, the defendant, Mrs. Durnford, at divers periods, from October, 1846, to February, 1848, advanced and lent to the said J. Punter, several sums of money amounting together to 600*l.*, and that the sum of 350*l.* part of the 600*l.* was so advanced and lent to Punter, to enable him as such executor, to pay off and discharge a mortgage debt of 250*l.* and interest to Smart, charged upon the three houses, and also to pay certain charges which Punter had incurred as such executor, and in and about the testator's estate, and that the said defendant had taken other security for the remainder of the 600*l.* Then it proceeds to state as to the 350*l.*, that there was something due for interest, making altogether 370*l.*; and the mortgage was made for that sum.

Now it is clear that the equitable mortgage of October, 1848, having been made for the 600*l.* was itself apparently a security given, partly for what was alleged to have been advanced to Punter as executor, and partly for what was not alleged to have been advanced to him as executor. Then the mortgage deed recites, in the statement of the parties to that deed, that the 350*l.* had been advanced to him in his character of executor. Now, the principle on which the court acts is this:— An executor taking on himself to deal with the assets in his hands as executor, it is considered important to preserve in the executor, the unfettered control over them, and the court gives him *prima facie* an unfettered right of dealing with the assets, for raising money wanted for the estate, and the *onus* is not thrown on the party advancing the money on security of the assets, to show that it is wanted for the testamentary purposes. It is true, that in the case of a private banker of the executor to whom he owes a private debt, if the banker takes as security for his private debt, property which he knows to be the assets of the testator, there he is a party to what is a *devastavit* or improper application of the testator's estate. And so in this case. If it were not for the statement of Mrs. Durnford and Punter, made after the money was advanced, there would be nothing to show that the 600*l.* was advanced for any other than private purposes. While the court is careful to look to the way in which an

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Miles v. Durnford; Durnford v. Wood. 

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executor deals with the assets, that does not apply to cases in which he only gives security for the antecedent advances, long after they have been made. The advances were made, not even upon an undertaking to give security upon the assets, though wanted for executorship purposes, and the subsequently giving a security, was not for raising money for the purposes of the estate, but giving a security for antecedent advances, and without any legal necessity to give that security. I think, therefore, that where a party having advanced money for the purpose apparently of the estate, but on the personal security of the executor without taking a security, and if that party takes for these antecedent advances a subsequent security on the assets of the testator, that cannot be considered to come within the rule, but the party is then bound to see that the money was applied for the purpose of the executorship. The principle on which the cases have been decided involve this as a necessary consequence.

If there were no other difficulty in this case, I should refer it to the Master to ascertain what sums of money were applied for the purpose of the administration of the testator's estate; but I confess I think I am precluded from making such a decree as attempts to invalidate the mortgage, owing to this, that the party asking to invalidate it, is himself the representative of the person who is a party to it. It is true the bill is filed by Miles, in his character of executor to John Punter the testator, wishing to throw off another character which he assumes, which is that of the representative of J. Punter the younger. It appears that after having proved the will of John Punter, the father, he takes out letters of administration in 1849, and takes upon himself to represent the position of John Punter, the son, and I cannot hear the plaintiff say, "Although I assume the two characters, in one of which I cannot impugn the transaction, yet I wish to shut out my character in which I cannot impeach the transaction, but retain the character in which I can." It is clear if J. Punter the younger were living, and Miles had joined with him in impeaching the transaction, that would have been bad, and if Punter alone had filed the bill, it is clear he could not have been heard to say this. It appears to me that the present plaintiff, although not personally mixed up with these transactions, as he has taken upon himself to sustain the character of the representative of the person who could not impeach them, cannot be allowed to separate the two characters, and sue only in one of them. For these reasons, I cannot make a decree as to the original bill which seeks to impeach the mortgage.

As to the other bill of Mrs. Durnford, which charges Mr. Wood, the subsequent mortgagee, with fraud, it is admitted that there is no ground for maintaining the allegation of fraud; therefore, I must also dismiss so much of that bill as charges the fraud. That bill seeks to impeach the security, and that it may be declared to be fraudulent and void. As to so much as does that, it must be dismissed with costs; and as to the rest I must make the common decree for redemption and foreclosure.

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Miles v. Durnford; Durnford v. Wood.

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The case subsequently came before the Lords Justices, on appeal by the plaintiff, when

*Nalder* contended that the bill was properly filed in point of form, and cited, in addition to the cases referred to on the original hearing, *Lambert v. Hutchinson*, 1 Beav. 277; a. c. 8 Law J. Rep. (n. s.) Chanc. 196.

*Willcock* and *Gifford* were heard for the respondent.

KNIGHT BRUCE, L. J. — The case is this : — One of two executors, by being acting executor, committed, it is alleged, a breach of trust with respect to the general personal estate, and having done so, he died, and the surviving executor of the testator, innocent of participation in the breach of trust, makes himself an administrator of the executor who committed the breach of trust. I am of opinion it is competent for him to file a bill to make good the breach of trust, submitting all in a proper mode to this court.

LORD CRANWORTH, L. J., concurred.

*Nalder* was then heard on the second point, and contended that although the money was advanced by Mrs. Durnford to Mr. Punter, Jr., before he gave her the security, it did not become necessary for the plaintiff on that account to show that the act done by Punter, Jr., as executor was a proper act, and, further, that in the absence of proof to the contrary, the loan must be taken as having been properly obtained for the purposes of the executorship. He cited the following additional cases : *Scott v. Tyler*, 2 Dickens, 725; *Hill v. Simpson*, 7 Ves. 152.

*Willcock* and *Gifford* were not called on.

KNIGHT BRUCE, L. J. On the evidence, the security is not impeached, — not touched. Assuming, then, that all the evidence that can be, has been adduced, the question is, whether this creates such a case of suspicion as that further inquiry should be directed or allowed. I am of opinion that that proposition cannot be warranted. The only evidence is, then, that the advances were originally made without security, and that the security was afterwards added. That is a circumstance deserving of attention, but it does not go a long way; it is not inconsistent with the probability that the advances were made for the purpose for which he might properly borrow as executor. But that being the case, all is clear; and, in my opinion, the presumption is in favor of that view of the case, and that the plaintiff wholly fails.

LORD CRANWORTH, L. J. We both concur with the Vice-Chancellor that the bill ought to be dismissed, but we arrive at that conclusion on different grounds.

In the Matter of TINKLER'S TRUSTS.<sup>1</sup>

July 10, 1852.

*Annuity—Charge on the Corpus—Compulsory Sale.*

A testator devised real estate to B, charged with an annuity to A, for her life, with powers of distress and entry. The rents fell short of the annuity, and an arrear became due to A. A sum of money (less than the arrear) was paid into court by a railway company in respect of a part of the estate which had been taken by them:—

*Held*, that A, was entitled to this sum in respect of her arrears.

R. TINKLER, by his will, dated in January, 1840, devised all his real estates to the uses therein mentioned, charged with an annuity of 100*l.* a year to his wife for her life, with powers of distress and entry, and died soon after the date of his will.

The rents of the devised estates fell short of the annuity, and an arrear of upwards of 300*l.* became due to Mrs. Tinkler.

The Great Northern Railway Company took some land, part of the devised estates, and paid into court the sum of 262*l.* in respect of the purchase money.

This was the petition of Mrs. Tinkler, praying for the payment to her of the 262*l.*

C. J. Simpson, for the petition, contended that, although the sum in question formed in fact a part of the *corpus* of the estates, Mrs. Tinkler was entitled to it in respect of the arrears due to her, and cited *Greathead v. Elliot*, 15 Jur. 986.

*Hislop Clarke*, for the devisees, contended, that she was entitled only to the income of the fund in question.

PARKER, V. C., said, that the court would not sell the estate for the purpose of paying off the arrears, but, as by means of the powers of distress and entry, the devisees could not touch a shilling of the rents until the arrears were discharged, the annuity was, in a sense, charged on the *corpus*. As there had been here a compulsory sale, he thought that the money thus produced was available for the arrears, and the order would, therefore, be for payment of the fund to Mrs. Tinkler.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 672.

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*In re King's Estate.*

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*In re KING'S ESTATE.*<sup>1</sup>

June 26, 28, 1852.

*Will — Construction — Legal Estate — Mortgage — Securities for Money.*

A testator, a mortgagee in fee of real estate, gave and bequeathed to A all his moneys, securities for money, and all his goods, chattels, personal estate and effects whatsoever and wheresoever, to hold to A, his executors, administrators and assigns, he paying thereout all his debts:—

*Held*, that the legal estate in the mortgaged property passed to A.

MR. SUDBURY, a mortgagee in fee of real estate, made his will, dated the 27th of April, 1848, which was as follows: "I give and bequeath unto my wife, Frances Sudbury, all my moneys, securities for money, and all my goods, chattels, personal estate and effects, whatsoever and wheresoever, to hold to Frances Sudbury, her executors, administrators and assigns absolutely; she or they paying thereout all my just debts and testamentary expenses." The testator appointed his wife sole executrix.

The testator died in June, 1848, leaving an infant heir; and his will was proved by his widow.

This was a petition under the Trustee Act, 1850, praying for an order vesting the mortgaged estate in the executrix.

The question discussed on this petition was, whether the legal estate in the mortgaged property had passed, under the will, to the testator's widow, or whether it had descended on the heir.

*F. W. Clarke*, for the petition, contended that the legal estate had not passed by the will, and cited *Galliers v. Moss*, 9 B. & C. 267; s. c. 7 Law J. Rep. K. B. 109.

PARKER, V. C. I have looked into the cases on this subject, and I have no doubt that the words "securities for money" in this will pass the legal estate. The words "securities for money" are sufficient to pass the legal estate, unless there be something in the will to induce the court to come to a different conclusion. It is said that, in this case, the words "securities for money" are found among words relating exclusively to personal estate. This is, however, where you would naturally expect to find them, the mortgage money with which it is associated being personal estate. The object of the will is to give the executrix complete dominion over the mortgage money, and to enable her to receive it; and the court is not to put a construction on the will which would defeat that object. Then, it is said that the words of limitation apply only to personal estate. This argument appears to me to proceed on a confusion between

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 673.

*In re King's Estate.*

the authorities applicable to this case and those relating to a gift, in which there are words such as "estate," which may or may not relate to real estate, and where the collocation of the words and the words of limitation are important. Here you have the words "securities for money," very aptly expressing the legal estate, and their effect is not taken away because you have the words "executors and administrators" following as words of limitation.

If we look at the authorities we find that in *Silberschildt v. Schiott*, 3 Ves. & B. 49, Sir William Grant says, "There is no doubt a gift of the money would have carried his interest in the land upon which it was secured." Again, in *Renvoize v. Cooper*, 6 Madd. 371, Sir John Leach says, "I am of opinion that the mortgaged fee will pass to the wife by the subsequent gift of mortgages and other securities for money, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage security for money is a gift of all the testator's interest in the money and security, and will therefore pass the fee." On the other side there is the case of *Galliers v. Moss*, which Mr. Clarke referred to. That case must, however, I think, be considered as overruled by subsequent decisions. In *Ex parte Barber*, 5 Sim. 451, the Vice-Chancellor of England held that the words "securities for money" would pass the legal estate; and, in a case of *Mather v. Thomas*, 6 Ibid. 115, the point came before him again, and he intimated his opinion that they would pass the legal estate, notwithstanding the case of *Galliers v. Moss*, but sent a case for the opinion of the Court of Common Pleas, which held (10 Bing. 44; s. c. 2 Law J. Rep. (N. S.) C. P. 234) that the words in question did pass the legal estate. It is true that, in that case, the word "heirs" occurred as the words of limitation; but, on examining the will, it appears that there was a gift of "messuages or dwelling-houses, buildings, chattels real, ready money, securities for money, and debts to become due and owing," to trustees, their heirs, executors, administrators and assigns. The word "heirs" there, *reddendo singula singulis*, is properly referable to the real estate, and not to the words "securities for money." At all events, it appears to me to be putting too narrow a construction on the words to hold that the occurrence of the word "heirs" makes a material difference. There is a recent case which appears to me to be precisely in point. In *Doe d. Guest v. Bennett*, 20 Law J. Rep. (N. S.) Exch. 323; s. c. 5 Eng. Rep. 536, the words were, "I leave my wife to receive all moneys upon mortgages." The Court of Exchequer after going through the authorities, came to the conclusion that the wife took the legal estate. I think that I should be throwing the law on this subject backwards, and departing from what seems a very convenient rule of construction—a rule which obviously effects the testator's intention—if I held that the legal estate did not pass; and therefore I think that I can make no order on this petition.

In the Matter of WALKER'S ESTATE.<sup>1</sup>

July 17, 31, 1852.

*Will — Construction — Legal Estate — Mortgage — Securities for Money.*

A testator, a mortgagee in fee of real estate, gave and bequeathed to A, and B, all and singular his household furniture, goods, plate, linen, and utensils whatsoever, and all and every other his goods and chattels, stock-in-trade, moneys, debts, and securities for money, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his debts and to sell his personal estate, and hold the money arising therefrom upon the trusts therein mentioned:—

*Held*, that, under these words, the legal estate in the mortgaged property passed to the trustees.

JOHN WALKER, a mortgagee in fee of a freehold estate, made his will, dated the 3d of April, 1832, which was, in part, as follows: "I give and bequeath unto William Walker, of, &c., John Ollershaw, of, &c., and James Jowett, of, &c., all and singular my household furniture, goods, plate, linen, and utensils whatsoever, and all and every other my goods and chattels, stock in trade, moneys, debts, and securities for money, and all and every other my personal estate and effects whatsoever and wheresoever, and of what nature, kind or quality soever the same may be or consist of, whereof I or any person or persons in trust for me or for my use is, or are, or shall, or may hereafter be possessed of, interested in, or entitled unto, upon trust to collect in my said debts as soon as convenient, and sell and dispose of my said household furniture, stock in trade, and other my personal estate and effects, either by public auction or private contract, as they in their discretion may think proper, for the best price and most money that can or may be had or gotten for the same; and the money to arise therefrom, after payment of my debts, funeral, testamentary and other incidental expenses, I do hereby direct shall be laid out and invested in the public funds or upon mortgage of good freehold security, with power to alter and vary the same upon such and the like security as they or he shall think proper, and the interest to arise therefrom to pay in manner hereinafter mentioned."

The testator appointed his trustees his executors. The will did not contain any devise of mortgaged or trust estates.

The testator died in January, 1833, and his will was proved by all his executors.

The heir at law of the testator afterwards died intestate, leaving an infant heir at law, to whom the legal estate in the mortgaged property would have gone if it had been left undisposed of by the will of the testator.

This was a petition of the executors of John Walker, under the

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 674.

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*Ex parte The Vicar of East Dereham.*

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Trustee Act, 1850, praying for an order of the court that the legal estate in the mortgaged property might be conveyed to them by the infant.

*R. W. Moore*, for the petition, contended that the legal estate had been undisposed of by the will.

PARKER, V. C. referred to the case of *in re King's Estate*, 21 Law J. Rep. (N. S.) Chanc. 673; s. c. *supra*, p. 128; and held, that the legal estate had passed by the will to the executors, and therefore that no order was necessary.

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*Ex parte THE VICAR OF EAST DEREHAM.*<sup>1</sup>

May 28, 1852.

*Railway Act — Disqualified Persons — Investment — Reference to the Master.*

Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct; and praying for a conveyance and payment of the money out of court, without a reference to the Master — the Court made the order.

THE Norfolk Railway Company took, for the purposes of one of their acts, a piece of land, part of the glebe belonging to the vicarage of East Dereham in Norfolk, and, in respect of this purchase, the sum of 606*l.*, 3*l.* per cent. consols, was carried over to the account of the vicar of East Dereham.

This was a petition of the vicar.

The petition stated an agreement whereby he, the vicar, had agreed to purchase of W. C. Wollaston some land particularly mentioned in the agreement, in consideration of the stock standing to the above-mentioned account. The petition then contained the following statement:—"That the abstract of the title of the said W. C. Wollaston to the said hereditaments has been submitted by your petitioner to F. J. Turner, Esq., barrister-at-law, who has approved of the title thereby shown, and the several deeds, evidences and documents therein abstracted and referred to, have severally been examined and found correct." The petition prayed for a sale of the stock and the application of the money in the proposed purchase, and a conveyance to the vicar of the land, to be held by him in the same manner as the lands taken by the company had been held.

The petition was supported by proper affidavits.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 677.



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*Ex parte* The Vicar of Creech St. Michael.

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*W. M. James*, for the petition, asked for the order in the form proposed, in order to dispense with a reference to the Master.

*B. L. Chapman*, for the company.

KINDERSLEY, V. C. made the order.

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*Ex parte* THE VICAR OF CREECH ST. MICHAEL.<sup>1</sup>

July 3, 1852.

*Costs — Railway Act — Purchase of Lands for a Rectory with the Consent of the Ordinary of a Diocese.*

By a railway act a company was empowered to take lands belonging to a vicarage, and it was declared that the purchase-money should be paid into court, and, that, on a petition by the vicar and patron, and with the consent of the Ordinary of the diocese, it might be laid out in the purchase of other lands. A purchase was made accordingly:—

*Held*, that the Bishop was entitled to be paid by the company, not only the costs of his attendance in the Master's office, but also of his appearances on the petitions to the court for a reference and confirmation of the Master's report.

By the Bristol and Exeter Railway Act (6 Will. 4, c. 36, s. 9,) it was declared that the company might take for the purposes of their act the vicarage-house of Creech St. Michael, and the grounds belonging to it; but that they should not be allowed to take a part only, and that the compensation payable for such house and grounds should, "on petition to the Court of Exchequer by the vicar and patron for the time being of the vicarage, and with the consent of the Ordinary for the time being of the diocese," be laid out in the purchase of other lands to be settled to the same uses.

The vicarage-house and grounds were taken by the company, and the purchase-money was paid into court. A petition was afterwards presented for the investment of this money in the purchase of certain specified lands, and the usual reference was made to the Master, who, by his report, approved of the purchase and title. A petition was now presented for a confirmation of the master's report and a conveyance.

The bishop of Bath and Wells was the Ordinary of the diocese. The bishop had appeared in all the proceedings relating to the investment.

The only question, on the hearing of this petition, was as to the bishop's costs.

*H. Prendergast*, for the petition.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 677.

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Meyer v. Simonson.

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*Fooks*, for the bishop of Bath and Wells, asked for the costs of his appearances in the above matters.

*Osborne*, for the company. The duties of the bishop under this act were confined to an attendance in the Master's office to see that the purchase was proper and the title good. He had no right to appear at the hearing of either of the petitions, and was not entitled to the costs of such appearances. The order, then, ought to be that the costs should be so confined.

PARKER, V. C., said, that he thought that the bishop had a right to be present at all the proceedings, and was entitled to the costs asked for by counsel.

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MEYER v. SIMONSON.<sup>1</sup>

July 13, 1852.

*Will—Construction—Tenant for Life—Residue.*

A testator by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof, so long as she should continue his widow. A part of the personal estate of the testator, at his death, consisted of a debt of 12,000*l.* payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent. from the death on the debt or such part as for the time being should remain unpaid:—

*Held*, that the tenant for life was entitled to 4*l.* per cent on the debt or such part as should remain unpaid, and that the other 1*l.* per cent. ought to be invested for the benefit of the tenant for life and those entitled in remainder.

THIS was a special case under Sir George Turner's Act.

Solomon Meyer, by his will, dated the 19th of February, 1849, after certain legacies, made the following residuary devise and bequest:—"I give, devise, and bequeathe all the rest, residue, and remainder of my real and personal estate and effects, whatsoever and wheresoever, unto my said wife, and to any person or persons who may be executor or executors, trustee or trustees of this my will, and their heirs, executors and administrators, for and during the term of her natural life, if she shall so long continue my widow, upon trust to pay to or permit her, my said wife, to receive the income and profits thereof for her use and benefit, so long as she shall continue my widow, and from and after her decease," &c.

The testator appointed his wife to be his sole executrix, and died in August, 1850, and his widow proved his will.

A part of the testator's personal estate consisted of a debt payable by instalments, under the following circumstances:—Articles of partnership, dated the 4th of January, 1850, were made between Solo-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 678.

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Meyer v. Simonson.

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mon Meyer of the one part, and Meyer Meyer of the other part, to the effect that if either of the partners should die during the partnership, the share of the partner so dying should be transferred to the surviving partner, and that the surviving partner should give a judgment to the personal representatives of the deceased partner for the payment of a sum of money, to be ascertained as therein mentioned, and interest thereon at 5*l.* per cent. from the death of the deceased partner; the principal sum to be paid by annual instalments of 1,500*l.* each, the first instalment to be paid at the expiration of one year after the death of the deceased partner.

It was agreed between Mrs. Meyer, as executrix, and Meyer Meyer, as surviving partner, that Meyer Meyer should pay 12,000*l.* to the estate of the testator by the instalments mentioned in the articles.

On the 22d of January, 1851, Meyer Meyer gave a warrant of attorney, authorizing the attorneys therein mentioned to suffer judgment to be entered against him for 24,000*l.*, with a defeasance annexed on payment of 12,000*l.*, and interest at 5*l.* per cent., by the instalments mentioned in the articles, with a power, however, of enforcing immediate payment in default of payment of principal or interest; and judgment was entered up accordingly.

The opinion of the court was required whether Mrs. Meyer was entitled to the whole of the interest payable by Meyer Meyer, and, if not, what part should be considered interest and what part capital.

*Waley*, for Mrs. Meyer, contended that she was entitled to all the interest.

*Goldsmid*, for the persons entitled in remainder.

*Waley* replied.

PARKER, V. C. The question in this case, how a residue is to be dealt with as between a tenant for life and those entitled in remainder, where the will contains no direction to convert the property, is familiar to the court. The principle is contained in the judgment in *Howe v. Lord Dartmouth*, 7 Ves. 137, and the only difficulty is in applying it to particular instances. The personal estate of a testator for this purpose may be considered as divided into three different classes. First, property which is found at the testator's death invested in such securities as the court can adopt, as money in the funds or on real securities. The tenant for life is entitled to the whole income of this. Secondly, property which can be converted into money without sacrificing any thing by a forced sale. As to this, the rule is clear, it must be converted, — and the produce must be invested in securities which the court allows, and the tenant for life is entitled to the income of such investment. Thirdly, property which, according to a reasonable administration, is not capable of an immediate conversion into money, and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case the

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Goodman v. Drury.

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rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value.

In this particular case part of the personal estate consists of money invested on personal security, and payable by instalments. It is contended that the tenant for life is entitled to the whole interest. The contract might have been that the money was to remain out for longer periods, and that a larger rate of interest, as 10% per cent., should be paid. The result of Mr. Waley's argument would be, that the tenant for life would be entitled to the whole of the income so produced during that period. The case cannot be stated more beneficially for the tenant for life than by assuming that the debt is well secured, and will certainly be repaid without any loss of capital. Supposing this to be so, I do not think that the tenant for life can be allowed to have the whole interest of 5% per cent. payable upon that debt. This would clearly be giving her more than a life interest in the present value of the property. In *Gibson v. Bott*, 7 Ves. 89, and *Caldecott v. Caldecott*, 1 You. & C. C. C. 312; s. c. 11 Law. J. Rep. (N. S.) Chanc. 158, it was held, that the tenant for life should have 4% per cent. upon the present value. I think that the proper conclusion to come to is, that the tenant for life should have 4% per cent. upon the principal sum secured, from the death of the testator, and that the additional 1% per cent. should be invested from time to time, and she should have the income of that investment. The principal sum, as it comes in, must also be invested, and the tenant for life is entitled to the income produced by that investment. I do not think it necessary, in this case to have any present value put on this debt.

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GOODMAN v. DRURY.<sup>1</sup>

July 23, 1852.

*Will—Construction—Vesting Legacies charged on Land.*

A testator devised real estate to A, in fee, charged with an annuity to B, for life, and directed that after the death of B, the estate should be charged with the payment of 100*l.* apiece to X, Y, and Z, and that the same should be paid to them respectively within six calendar months after the death of B, or such of them as should be then living. X died in the lifetime of B:—

*Held*, that the legacy to X had not vested, and was not payable to his representatives.

HENRY BATES, by his will, dated the 2d of February, 1827, devised his real estates therein mentioned to John Goodman, for his life, "charged and chargeable as hereinafter mentioned," and, after his death, to William Goodman, his heirs and assigns. He then charged the devised estates with an annuity of 50*l.* to his wife, and,

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 680.

after her death, with an annuity of 15*l*. for his niece Mary Freeman, for her life. The will then proceeded as follows : — “ And, from and after the decease of my said niece, I do hereby further direct that the said hereditaments and premises shall stand and be further charged, and I do hereby onerate and charge the same with the payment of the sum of 100*l*. apiece to Richard, Mary, and Louisa Freeman, the children of my said niece Mary Freeman; and which said several sums of 100*l*. I do hereby give and bequeathe to each and every of them accordingly, and do direct the same to be paid and payable to them respectively, within six calendar months next after the decease of my said niece Mary Freeman, or to such of them as shall be then living.”

The testator died in 1835, and his widow in 1836.

Mary Freeman, the daughter, married Mr. Drury, and died in the lifetime of Mary Freeman, her mother, the annuitant, who died in 1851.

This was a special case under Sir George Turner's Act. The question was, whether the legacy of 100*l*. had absolutely vested in Mrs. Drury, so as to entitle her husband, who had taken out administration to her, to receive it.

*Russell and Pryor*, for the devisee of the estate, cited *Howes v. Herring*, M'Cle. & Y. 295.

*Malins and Shapter*, for Mr. Drury, cited *Farmer v. Francis*, 2 Sim. & S. 505; s. c. 4 Law J. Rep. Chanc. 154; and *In re Bartholomew's Trust*, 1 Hall & Tw. 565; s. c. 1 Mac. & G. 354; 19 Law J. Rep. (N. S.) Chanc. 237.

PARKER, V. C. Where there is a gift of personal estate to a legatee, the postponement of the payment to a future period does not prevent the legacy from vesting. This, however, is not the case where there is a gift of money charged on real estate. Whatever may be the terms of a gift of money charged on land, if the payment is postponed, the legacy will not vest until the time of payment. There is an exception to this rule (which does not apply here) where the postponement of the payment might appear to have reference to the situation or convenience of the estate. Here the direction is, that the estate “shall be charged with the payment of 100*l*. to each of three children of Mary Freeman, and which sum I do hereby give and bequeathe to them accordingly.” Had the will stopped there, they would have had vested interests. It goes on, however, to say, “I direct the same to be paid to them within six months after the death of Mary Freeman, or to such of them as shall be then living.” This contingency attached to the time of payment, and made, I think, the legacy contingent on the legatee surviving Mary Freeman.

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In the Matter of Rees' Devises.

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In the Matter of REES' DEVISEES.<sup>1</sup>

July 3, 1852.

*Trustee Act 1850 — Railway Company — Costs.*

A petition, under the Trustee Act, 1850, stated that A had mortgaged lands to B, in fee; that B had died, having by his will devised the lands to infants, and appointed C his executor; that a contract had been entered into by C with a railway company for the sale of a part of the lands at a certain price, and that, for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C, and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs:—

*Held*, that the court had no jurisdiction to make any order either in favor of, or against the company.

THIS was a petition under the Trustee Act, 1850. The petition stated that Mr. Biddulph had mortgaged lands to Mr. Rees in fee, with a power of sale, that Mr. Rees had died, having by his will appointed an executor, and devised the mortgaged estate to infants. The petition then stated a contract between the company and the executor for the purchase of a part of this land, and that, with a view to this contract, it had been desired that the legal estate in the property should be vested in the executor. The petition then prayed that the estate might be conveyed by the children to the executor, and that the railway company might pay the costs of the petition.

The company were served with the petition.

The petition was not headed in the matter of the Lands Clauses Consolidation Act or the particular Railway Act.

*Metcalf*, for the petition, contended that, as the petition in this case had been rendered necessary by the contract with the company, it was one of the items of costs which the company were bound to pay. There was, perhaps, a defect in not having the petition headed in the matter of the Railway Act and the Lands Clauses Consolidation Act, but the court would probably give leave to have the petition amended in this respect. He referred to the 82d section of the Lands Clauses Consolidation Act.

*Bovill*, for the company, objected to the question of costs being considered on this petition.

PARKER, V. C., said, that on the petition before him, he had not jurisdiction to make any order on the company. The vendors must make out their bill of costs, and send it to the company, and the taxing Master would have to judge of any items which might be disputed. He had no objection, if both parties wished to submit the question to him as to these costs, to act as arbitrator in the matter. In the

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 687.

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*In re Bateman's Estate — Wallis v. Sarel.*

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absence of such submission, he should make no order as to the costs.

*Bovill*, for the company, declined to give such submission, and asked for the costs of the appearance of the company on the petition.

*PARKER*, V. C., said that he had not jurisdiction on the petition to make any order for, or against, the railway company, and declined to give costs.

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*In re BATEMAN'S ESTATE.*<sup>1</sup>

July 31, 1852.

*Railway Company — Persons under Disability — Money paid into Court — Surplus.*

Where money has been paid into court in respect of lands taken by a company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l.* the court will allow it to be paid to the tenant for life, but not otherwise.

A RAILWAY company took, for the purposes of their act, some settled lands, and the purchase-money was paid into court. This purchase-money, with the exception of 52*l.*, was laid out in the purchase of other lands. On the petition brought for completing the purchase under the sanction of the court, the tenant for life asked that the sum of 52*l.* might be paid to him, he undertaking to lay it out in lasting improvements.

*G. L. Russell*, for the petition, cited *Ex parte Barrett*, 19 Law J. Rep. (N. S.) Chanc. 415.

*PARKER*, V. C., said, that the rule which he laid down was not to allow sums exceeding 20*l.* to be paid out under the circumstances stated in the petition.

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*WALLIS v. SAREL.*<sup>2</sup>

March 26, 1852.

*Sale, Conditions of — Interest on Purchase-money — Sale of a Reversion.*

Real estate, including property in possession and in reversion, was put up for sale by auction in lots, under a condition that the vendors should confirm the Master's report of purchases

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 717.

<sup>2</sup> 21 Law J. Rep. (N. S.) Chanc. 717.

*Wallis v. Sarel.*

on or before the 25th of December, 1849, and that, on or before that day, each purchaser should pay his purchase-money into court, and be entitled to the rents of his lot from that day, and that if, from any cause whatever, the purchase-money should not be so paid, he should pay interest on it at 5*l.* per cent. from that day. A purchased a reversion in fee, being one of the lots. Through the default of the vendors, the Master's report was not confirmed until August 1851. Motion that A should pay his purchase-money into court with interest from the 25th December, 1849:—

*Held*, that interest was payable from that day at 4*l.* per cent.

On the 22d of September, 1849, certain real estate was put up for sale by auction in lots. To the greater part of this property the vendors were entitled in possession.

The second condition of sale was as follows:—“The vendors undertake at their own expense to procure and confirm the Master's report of all purchases, and obtain an order for each purchaser to pay the amount of his or her purchase-money into court on or before the 25th of December, 1849; and, on or before that day, each purchaser is to pay into the bank the amount of such purchase-money, and then be let into possession of, or be entitled to the receipt of the rents or an apportioned part of the rents of his or her lot; but if, from any cause whatever, the purchase-money shall not be so paid in on the 25th of December, 1849, the purchaser is to pay interest thereon at the rate of 5*l.* per cent. per annum from that day to the time of payment.” By the third condition the vendors undertook to have an abstract of their title ready for delivery to the purchasers within ten days after the confirmation of the Master's report of the sale.

Lot 6, the property in question on this motion, was a reversion in fee, subject to a term of ninety-nine years, determinable on the deaths of two persons aged fifty-seven and fifty-three, at a rent of 3*l.* 9*s.* 2*d.*

Owing to circumstances in which the purchaser of this lot had no concern, the vendors did not confirm the Master's report as to this lot until August, 1851, and the abstract of title was not delivered until September, 1851.

This was a motion on the part of the plaintiff that the purchaser of this lot should pay his purchase-money into court with interest from the 25th of December, 1849.

*Moxon*, for the motion, contended that, although the purchaser was not in fault as to the delay, he was still liable to pay this interest. The sale being of a reversion, the purchaser had the benefit of the wearing out of the lives, and was to be considered as having been in possession from the time of the sale. He cited *Trefusis v. Lord Clinton*, 2 Sim. 359; *Morris v. Wood*, Dart on Vend. and Purch., p. 330, 2d edit.

*Nichols*, for the purchaser, contended, that as the delays in confirming the Master's report and delivering the abstract were to be attributed to the vendors, and had not in any way been caused by the purchaser, the purchaser was not bound to pay the interest required. He referred to *De Visme v. De Visme*, 1 Hall & Tw. 408; 1 Mac. & G. 336; s. c. 18 Law J. Rep. (n. s.) Chanc. 159.



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Jones v. Foxall.

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PARKER, V. C., said, that he thought that the sale in question, being of a reversion, the case of *De Visme v. De Visme* did not apply. The purchaser had had the benefit of the wearing out of the lives, and he must pay interest from the 25th of December, 1849. This interest ought, however, to be at the rate of 4l. per cent. per annum only, according to the usual practice of the court, and the purchaser was to be entitled to the rents received in the mean time.

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JONES v. FOXALL.<sup>1</sup>

January 27, and March 29, 1852.

*Trust, Breach of.—Annual Rests—Costs—Compromise—Letters—Evidence.*

A trustee of a marriage settlement, who allowed a sum of 350l. to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5l. per cent. interest:—

*Held*, liable to account, with annual rests, and also to the costs of the suit.

The court will discountenance all attempts to convert offers of compromise, by letter, into admissions prejudicial to the parties using them.

Observations as to the limited purpose for which such letters may be used.

ANN MINCHIN previous to her marriage was possessed of a sum of 350l., which she had lent at interest at 5l. per cent. to Thomas Clark, Francis Clark and Joseph Foxall, who carried on business in co-partnership as toy-makers at Birmingham, under the firm of Thomas Clark & Co.

In June, 1830, upon the marriage of Thomas Jones with Ann Minchin, she assigned the 350l. due from the firm of T. Clark & Co., together with certain stock in trade, &c., belonging to her, to Charles Chamberlain and J. Foxall, upon trust, to stand possessed of the trust moneys and effects for the separate use of A. Minchin for life, and to pay, assign and deliver the same, or any part thereof, to her or to such person or persons as she should by writing, or by her last will appoint, with full power for her to carry on the said trade, and to vary the stock, debts and effects employed therein, as a *feme sole*, for such time as she should think proper. And upon further trust, that the said trustees should, when requested by A. Minchin by any note or writing, and after her decease, of their or his own proper authority, collect, get in and receive the sum of 350l. and interest, and other the moneys, effects and premises, and invest the produce in their names in the public funds of Great Britain, and pay the dividends to A. Minchin for life for her separate use, and after her decease in trust for the child and children of the marriage.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 725.

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The marriage was duly solemnized, and A. Jones received the interest during her life, and never required the 350*l.* to be got in. She died on the 5th of November, 1834, leaving George Jones, the plaintiff, an infant, her only child, but no step was taken to get in the 350*l.*, or to receive the interest until this bill was filed in January, 1850.

At the time of the execution of the settlement, the 350*l.* was due from J. Foxall, the trustee, and his copartners jointly and severally, and so it continued until October, 1847, when T. Clark died, and F. Clark and the defendant, J. Foxall, continued to carry on the business until the beginning of the year 1850, a fortnight before the filing of this bill, when the partnership was finally dissolved.

In March, 1836, C. Chamberlain retired from the trust, without having taken any step to get in and invest the money settled; and on the 24th of March, 1836, Thomas Willson was appointed co-trustee with J. Foxall in his stead. C. Chamberlain subsequently died, and this suit was revived against his legal personal representative, but neither F. Clark, nor the legal personal representative of T. Clark, deceased, were made parties to the suit.

The bill prayed an account of the profits made by J. Foxall on these balances, and for a reference to the Master to ascertain whether it would be for the interest of the plaintiff to take the amount of the profits realized by the use of these sums of money; or if the court should be of opinion that he was not entitled to such relief, then that it might be paid, with interest at 5*l.* per cent. per annum, with yearly rests.

The defendant, J. Foxall, by his answer said, that before the 31st of December, 1849, and above a fortnight before the bill was filed, the whole of the principal and interest at 5*l.* per cent. was invested in the funds in the joint names of J. Foxall and T. Willson, upon the trusts of the settlement, and that the plaintiff was entitled to nothing more, and that consequently whatever decree the court might make as to the security of the fund, they, the defendants, were entitled to have their costs of the suit.

A long correspondence was entered into between the solicitors of Thomas Jones, the plaintiff's father, and the solicitors of the defendant J. Foxall, a great portion of which was embodied in the answer of the defendants, and was given in evidence to prove admissions against the plaintiff, and which was justified on the ground that an issue would have been necessary to try a fact stated in the letters, which might have defeated the suit, though written without prejudice if they had not been put in evidence.

*James and Selwyn*, for the plaintiff. Upon the death of Ann Jones, a clear breach of trust was committed by both the trustees. If a partner died, leaving a capital in the firm, it was a debt due from the surviving partners to the estate of the deceased partner; and in this case, as the debt was not received, and the surviving partners have made a profit, it is a debt due from them. They had full notice that the money was the subject of the trust. The plaintiff, therefore, is entitled to an account, with annual rests. *Heathcote v. Hulme*, 1 J. &

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W. 122; *Burden v. Burden*, 1 Ves. & B. 170; *Willett v. Blanford*, 1 Hare, 253; s. c. 11 Law J. Rep. (N. S.) Chanc. 182.

*R. Palmer* and *Eddis*, for the defendant, J. Foxall, insisted that no annual rests ought to be directed, but that the defendants were entitled to the costs of the suit, as the principal and interest was invested before the bill was filed. *Chambers v. Howell*, 11 Beav. 6; *Wedderburn v. Wedderburn*, 2 Keen, 722; s. c. 4 Myl. & Cr. 41; 8 Law J. Rep. (N. S.) Chanc. 177.

*Elmsley* and *Shee*, for the executor of C. Chamberlain. No time is clearly defined within which *laches* is to be attributed to a trustee. *Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 1; *Buxton v. Buxton*, 1 Myl. & Cr. 80.

*James*, in reply.

March 29. THE MASTER OF THE ROLLS. The question is, whether the defendant, J. Foxall, is liable as a trustee of the settlement made on the marriage of Ann Minchin, the mother of the infant plaintiff, for more than the principal, with interest at 5*l.* per cent. for a sum of 350*l.* secured by that settlement. The defendant admits his liability to that extent, and before the filing of the bill expressed his readiness to make the amount good without suit. The plaintiff, by his next friend, claims more than this, and contends that the defendant is liable to account for the profits produced by the 350*l.* or for interest at 5*l.* per cent., with annual rests, on the ground that the money was employed by the defendant in his trade and in violation of his duty as trustee. The settlement provided that the trustees should call in the debt of 350*l.* during the life of Ann Minchin, when they should be requested by her so to do, and after her decease the settlement made it imperative upon the trustees, without any application or request from any one, to call in this sum and interest due on it, and to invest the amount in government or real securities upon the trusts of the settlement.

The rules which apply to cases in which executors are charged with interest on balances retained by them are subject to difficulty, arising not so much from any doubt as to the principles themselves, as from the practical application of them to particular cases. Generally, it may be stated that, if an executor has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at 4*l.* per cent. on those balances. If, in addition to this retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing 5*l.* per cent. he will be charged with interest after the rate of 5*l.* per cent. per annum. If in addition to this he has employed the money so obtained by him in trade or speculation, for his own benefit and advantage, he will be charged either with the profits actually obtained by him from the use of the money, or with interest at 5*l.* per cent. per annum, and also with yearly rests, that is, with

compound interest. The principle on which the court charges an executor with profits which have actually arisen from the property of the *cestui que trust* employed by him, is obvious, and of general application when such profits are proved to have been made. It was the money of the *cestuis que trust*, and they are entitled to receive the profits that are earned. The principle upon which executors and trustees, when charged with interest on balances, are made to account with yearly or half-yearly rests, is not so clearly defined, nor are the decided cases by any means free from obscurity or contradiction. In some cases the court has charged the trustee with annual rests, because the trust under which he acted, in distinct terms required him to accumulate the fund with compound interest. In other cases the principle seems to have been, that the court visits the trustee or the executor with an account in the nature of a penalty for his misconduct, where he has not merely committed a breach of trust, but where he has himself actually endeavored to derive, or has, in fact, derived, some pecuniary advantage from the use of the money of which he has thus obtained possession. In all these cases, however, a large discretion seems to have been exercised by the court, which has regarded the facts and circumstances attending each particular case, and it is to the exercise of this discretion that the difficulty of discovering the principle in some of the reported cases is to be attributed, and it is only upon this principle that the later cases, in which the rule has been drawn more stringently against the trustee, can be reconciled with some of the earlier cases.

In the case before me, a direct and positive breach of trust was committed. It was not merely negligence by omitting to perform the duty incidental to trustees, but a direct disobedience by the defendant, J. Foxall, in his character of trustee of the plain and positive trust which he had been directed to perform, and which, by accepting the trust, he had undertaken to perform. The trustees were enjoined by the deed on the decease of the mother to get in the sum of 350*l.*, and to invest it upon the trusts of the settlement, and if this had been done the fund would have produced compound interest for the plaintiff; for as he was then, and still is, an infant, and as his father appears to have been of ability to maintain him, the dividends might and ought to have been re-invested from time to time, for his benefit until he attained twenty-one. Instead, however, of adopting this course, the defendant, J. Foxall, continued his money as part of the capital engaged in the firm carried on by himself and his partners, and, besides the advantage resulting from the increase of capital to the concern, his share of the profits produced by it is increased.

It was argued that the sum was of small amount, and that it can scarcely be supposed any great advantage was to be derived from a sum of 350*l.* to a trading concern. I feel myself bound, however, to disregard that argument. The principle must be the same, whether the sum be large or small; and if the benefit is small, the sum charged upon the trustee will be proportionately small also. In all this J. Foxall acted in direct violation of his duty as trustee. It was a violation of his duty not to endeavor to obtain payment of the prin-

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cipal or interest of this sum of money for the benefit of the infant *cestui que trust* from the month of November, 1834, up to the month of January, 1850, when this bill was filed, a period exceeding fifteen years. The rate of interest secured by the conditions on which the loan was originally made, was 5*l.* per cent. per annum. Interest, therefore, at a less rate than 5*l.* per cent. could not be charged, and if paid and advanced to the benefit of the infant, it would have accumulated at compound interest. The neglect to pay off this money is a tacit acknowledgment by the partners, the trustee being one of them, that the retention and employment of it by them was beneficial, even though 5*l.* per cent. per annum was paid for it. It is obvious, therefore, that J. Foxall must be charged with something more than the mere repayment of the principal and the interest retained by him and his partners for fifteen years.

The question is, in what way he is to be charged. I cannot charge him as trustee with a greater amount of profits than he has actually received; and according to the evidence before me, as indeed was probable, the trustee, J. Foxall, received only a third part of the profits produced by this sum. It would clearly, therefore, not be for the interest of the plaintiff to make him account only for one third of the profits. But with regard to the question of annual rests, there are various considerations that have led me to the opinion that he must be charged with them. These considerations are, first, the direct breach of trust committed by the trustee not requiring payment of this money. Secondly, the long time that has elapsed since the breach of trust was committed. Thirdly, the absence of any attempt either to repair the breach or to perform the trust till complaint was made shortly before the filing of the bill. Fourthly, and more especially, that during all this time the whole of the trust fund has been employed in the trade carried on by the trustee and his partners, from which, in common with them, he has derived some benefit. To which may be added, the circumstance I have mentioned, that if the defendant, J. Foxall, and his partners had regularly paid the interest they had contracted to pay, even if the principal money itself had not been repaid, the infant would have had the benefit of that interest which has been retained by the trustee and his partners in their trade.

Taking all these matters into consideration, I am of opinion that the defendant, J. Foxall, must be charged, not only with interest at 5*l.* per cent. on the balances, but in taking such account he must be charged with yearly rests. In addition to that, as this suit has been occasioned by the necessity of resorting here to repair the breach of trust committed by him, and as he has not offered to do without suit what in my opinion the plaintiff is entitled to recover, I am of opinion that he must also pay the costs of the suit.

I should here conclude what I have to say; but I think it proper to add that I have paid no attention to the correspondence and negotiation which occurred between the father of the plaintiff and the defendant, J. Foxall, which has been given in evidence and commented upon in this case. In the first place, the plaintiff, who is an infant, cannot be bound by admissions by any one professing to act on his

*Ex parte The Overseers of the Poor of Ecclesall Bierlow.*

behalf; but, in addition to this, I find the offers were made without prejudice to the rights of any parties, and I shall, as far as I am able, in all cases endeavor to suppress a practice, which, when I was first acquainted with the profession, was rarely, if ever, ventured upon; but which, according to my experience, has been common of late, namely, that of attempting to convert offers of compromise into admissions and acts prejudicial to the parties making them. If this were permitted, the effect would be that no attempt to compromise a suit would ever be made. If no reservation of the parties who make an offer of compromise, could prevent that offer and the letters from being afterwards given in evidence, and made use of against them, it is obvious that no such letters would be written or offers made. In my opinion, such letters and offers are admissible for one purpose only, *videlicet*, to show that an attempt has been made to compromise the suit, which may be sometimes necessary; as, for instance, in order to account for lapse of time, but never to fix the persons making them with admissions contained in such letters, and I shall do all I can to discourage this, which I consider to be a very injurious practice.

The estate of the other trustee is liable to make good the principal and interest, but the annual rests are to be decreed only against J. Foxall, whose firm derived benefit from the money, and who was the principal acting trustee.

*Ex parte THE OVERSEERS OF THE POOR OF ECCLESALL BIERLOW.*<sup>1</sup>

June 20, July 10, and August 2, 1852.

*Charity—Trust Funds—Investment—Real Estate.*

The court will sanction the sale of a piece of land, which in 1747 was purchased by trustees with charitable funds and conveyed to them, it being plainly advantageous to the charity.

It will also sanction the reinvestment of the money in real estate; and the court will confer upon the trustees powers to perpetuate themselves, as well as to lease the land, there being such powers in the deed conveying the land to the trustees originally purchasing.

THIS petition was presented under the 52 Geo. 3, c. 101, and the Trustee Act, 1850, praying for the appointment of trustees for a trust or charity, and to obtain an order vesting a close of land, called "The Carr," in Ecclesall, with the appurtenances, in the petitioners as trustees, and to confirm a contract made to sell the same to John Shortridge, and that the trustees, upon payment of the residue of the purchase-money and interest might be at liberty to convey the land to the purchaser and his heirs. It also asked for the confirmation of a scheme for the investment and management of the trust property; or for a reference to the Master to appoint new trustees, and state whether

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 729.

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*Ex parte The Overseers of the Poor of Ecclesall Bierlow.*

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the contract should be carried out, and to settle and approve of a scheme for the investment and management of the trust property, and that the trustees to be appointed might be invested with powers of appointing new trustees, and of demising the lands to be purchased, similar to those contained in the indentures originally conveying the lands to trustees. It also asked for payment of the costs, and that they might retain them out of the purchase-money.

In 1747 the trustees of certain charitable funds laid them out in the purchase of a piece of land called "The Carr," situate near Hawslin, otherwise Machon Bank, in Ecclesall Bierlow, in the parish of Sheffield, and by indentures dated the 10th and 11th of February, 1747, which were registered at Wakefield, and enrolled at the Chapel of the Rolls, the piece of land, which contained about three acres, and was let for 4*l.* 10*s.* a year, was conveyed to John Nodder and his heirs, to the use of John Nodder, John Fenton, Thomas Waterhouse, Richard Dalton, Thomas Bright, Joseph Parker, and William Fox, and their heirs, upon trust out of the yearly rents to expend the sum of 40*s.* in the purchase of good wholesome bread to be distributed on four several Sundays, which were specified, in equal proportions, in the chapel of Ecclesall immediately after divine service in the forenoon, among thirty poor persons, inhabitants, who should have attended service in that chapel, so that each of such thirty poor persons might have a loaf of the same bread of the true value of 4*d.*, and in case there should be more than thirty persons, entitled to partake, then among such as the trustees should think fit; and as to the residue of the rents, after deducting all expenses, one third part was to be applied for the relief of twenty poor housekeepers within Ecclesall, and for that purpose to be paid to the overseers to be distributed, and the remaining two third parts of the residue of the rents were to be paid by the trustees to the overseers of the poor of Ecclesall, to be distributed among the poor of the township of Ecclesall. The deed also contained a power, that as often as three of the trustees should die, the survivors of them or the major part of them should appoint three other inhabitants of Ecclesall, to be trustees jointly with the survivors, and to convey the premises, so as that the same might be vested in them jointly. It also contained a power authorizing the trustees to demise the premises for twenty-one years at the best rent that could be obtained.

It appeared that since 1789, the overseers of the poor of Ecclesall had received the rents, and that since 1839, 6*l.* 6*s.*, being one half of the rent, had been paid by the overseers to the churchwardens to be distributed by them in bread, and that the other 6*l.* 6*s.* had been divided by the overseers of Ecclesall amongst the poor persons inhabitants of the township.

The Carr field having increased in value, and being well situate for building purposes, the overseers on the 3d of September, 1851, put up the same to auction, when John Shortridge was declared the purchaser, at the sum of 680*l.* subject to conditions, the fourth of which was "that the vendors should within twenty-one days from the day of sale make out a possessory title to the land, &c., in the overseers of

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*Ex parte The Overseers of the Poor of Ecclesall Bierlow.*

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Ecclesall for the last fifty years and upwards, by producing to the purchaser on application at the office of the vendors' solicitor the books of account of the overseers of the poor for the time being in which the rent of the land is from time to time entered, and should also produce a statutory declaration and furnish a copy thereof to the purchaser to identify the land and to show the possession thereof by the overseers for the last twenty years, which should be deemed sufficient evidence of title in the vendors, who should not be bound to give or deduce, or the purchaser to require any other evidence of title whatever to the land." Fifth, "that on payment of the remainder of the purchase-money, the purchaser should be entitled, at his own expense, to a conveyance of the land, but should not in such conveyance require any other party or parties to join therein in conveying the land to him except the present overseers of the poor for the time being, and in such conveyance the vendors should not be required to enter into covenants for title, but only that they or any of their predecessors had not to their knowledge done any act to incumber the land," &c.

It was also provided by the eighth condition that if, from any cause whatever the contract on the part of the vendors according to these conditions could not be carried out by them, or any dispute should arise between the vendors and the purchaser, the vendors should, at their option, either enforce the contract against the purchaser or be at liberty to rescind the same and return the deposit money, but without interest, each party paying his own expenses.

John Shortridge refused to accept a conveyance of the land from the overseers of the poor, on the ground that it was held upon a special trust for charitable and not for general parochial purposes, and was not legally vested in the overseers, but in the heirs or devisee of the surviving trustee named in the indenture of the 11th of February, 1747; he also refused to allow the contract to be rescinded until an application had been made by the overseers to the court under the act above mentioned, to confirm the sale, and to authorize and enable the overseers to convey the land to him, or until the court had refused to grant such application. J. Shortridge was willing to complete the purchase on having a conveyance, while at the same time the sale would be for the benefit of the charity. It was not known who of the trustees was the survivor, or in whom the close of land was legally vested.

The petitioners then stated that they were willing to be trustees, and that the purchase-money should be invested until it could be again laid out in land.

*Lloyd and Humphrey*, on behalf of the overseers and other inhabitants of Ecclesall, appeared in support of the petition.

*James* appeared for the Attorney-General.

THE MASTER OF THE ROLLS. I think upon the authority of *In re Parke's Charity*, 12 Sim. 329, that I may make the order, and give



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Wellesley v. Wellesley; The Countess of Mornington v. The Earl of Mornington.

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the trustees power to appoint new trustees, from time to time when they are reduced to, or below the number of five; but the surviving trustees exercising that power must not be less than three, and at each appointment the number of new trustees to be appointed must not be less than ten. A fortnight's notice of the intention to appoint new trustees, and the names of the persons proposed, must be placed upon the doors of Ecclesall church; and the trustees are to distribute the income amongst the poor of the parish not receiving parochial relief. The costs of all parties, including those of the Attorney-General, to be retained out of the purchase-money.



WELLESLEY v. WELLESLEY; THE COUNTESS OF MORNINGTON v. THE EARL OF MORNINGTON.<sup>1</sup>

February 27, 1852.

*Married Woman suing in Formâ Pauperis—Costs.*

The Court of Chancery having given a married lady leave to sue *in formâ pauperis*, on evidence that she could not procure a next friend, made a decree in her favor. One of the defendants appealed, but the appeal was dismissed, with costs:—

*Held*, that the appellant defendant must pay the lady herself *divers* costs.

ON the 23d of July, 1848, the Countess of Mornington, then living apart from her husband, obtained from the late Vice-Chancellor of England leave to sue *in formâ pauperis*, on an affidavit of her poverty, and that she was unable to procure any one to act as her next friend. In the month of July, 1849, the two above-mentioned causes came to a hearing, the question being whether the lady had a right to have all the means which were put in the power of Lord Mornington (one of the defendants,) acted upon by Lord Wellesley, his son by a former marriage, (the other defendant,) so as to carry into effect as far as possible, a certain agreement, under which Lady Mornington would be entitled to an annuity of 1,000*l.* a year, when the same learned judge decided in the lady's favor. From this decree Lord Wellesley appealed; but, after hearing arguments, their lordships, being of opinion that there was "no color, no shadow, no pretence for the appeal," agreed that it must be dismissed, and, if possible, with costs. Counsel were, therefore, directed to argue the question whether the lady, a peeress of the realm, having sued as a pauper, could claim her costs on the dismissal of an unsuccessful appeal, in the usual way.

*Bethell, Lloyd, and Nalder*, for the appellant, submitted that the

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 738.

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Wellesley v. Wellesley; The Countess of Mornington v. The Earl of Mornington.

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plaintiff suing *in formâ pauperis*, was only entitled to such costs as she had sustained out of pocket; but no cases were cited.

*Rolt, Willcock, and Freeling*, for Lady Mornington, argued that being successful, her ladyship was entitled to the costs in the same manner as any other suitor, and relied on, as a modern authority, the case of *Rubery v. Morris*, 1 Hall & Tw. 400; s. c. 1 Mac. & Gor. 413; 18 Law J. Rep. (n. s.) Chanc. 444, where Lord Cottenham laid it down that it was "most consistent with principle, and most reconcilable with the weight of authority, to hold that any party asserting an unfounded claim by a bill, or resisting a well-founded claim by answer, should not profit by the poverty of his opponent, but should, upon failure, pay the ordinary costs of the litigation."

KNIGHT BRUCE, L. J. The reason is plain enough; professional men are engaged to afford their aid and experience to the pauper, and not to the pauper's opponent. These costs ought, in my opinion, according to the weight of authorities, to be *dives* costs; but then comes the difficulty, there being no next friend to whom they are to be paid. The Countess is a married lady, and therefore the Earl would be entitled to the money when paid. I can hardly conceive it possible that Lord Mornington will interfere with their receipt.

*Lloyd.* Lord Wellesley, the unsuccessful appellant, is in this difficulty; that he is ordered to pay costs, and confessedly, the hand to receive those costs is uncertain. He may incur hazard of double payment should he pay to the wrong person.

LORD CRANWORTH, L. J. If the court had authority to permit Lady Mornington to sue without a next friend, and that authority has not been called in question, it has now authority to do all necessary acts consequential upon it. The costs must be the usual *dives* costs, and the order will be made in the ordinary way; and, on the one hand, if there be any difficulty raised whether Lady Mornington can receive them, her ladyship can come to the court, while, on the other hand, if Lord Wellesley finds any difficulty on the point spoken of on his behalf, he, too, can come here, and this court will hear him. At present the order is, that the appeal be dismissed, with costs.

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Footner v. Sturgis—Wiggins v. Wiggins.

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FOOTNER v. STURGIS.<sup>1</sup>

July 8, 1852.

*Judgment Creditor—Foreclosure—Sale.*

On a claim by a judgment creditor against his debtor in respect of certain real estate belonging to the debtor, the Court refused to give a decree of foreclosure.

THIS was a claim filed by a judgment creditor seeking to have the benefit of his judgment against some real estate belonging to the debtor.

*Hallett*, for the plaintiff, asked for a foreclosure, and cited *Ford v. Wastell*, 2 Phill. 591, in which case it appeared that a decree for foreclosure had been made at the instance of a judgment creditor.

PARKER, V. C., declined to give a decree for foreclosure, and made an order for the sale of the property.

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WIGGINS v. WIGGINS.<sup>1</sup>

April 30, and May 5, 1852.

*Will—Construction—Residuary Bequest—Children living at Death*

A testator gave to his wife all his stock in trade, working jewelry and implements of every description whatsoever, and all his book debts, ready cash, money in the funds, bills, bonds, notes, or other securities whatsoever, for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, moneys, debts and assets, and also all his household furniture, to be equally divided among the children he then had, or might thereafter have. But in case his wife should not marry again, then the testator bequeathed to her all and every his personal estate and effects whatsoever for her life, and the same to be equally divided amongst such of his children as should be living at her decease, share and share alike:—

*Held*, that the first clause in the will was not intended to be a specific bequest, and the last a residuary bequest; but that both clauses were intended to deal with the whole property, and were applicable to different events: the first applying to the testator's widow marrying again, the latter to her dying without marrying again; and the latter event being the one which happened, the children living at her death became entitled, to the exclusion of the representatives of those who had died.

A QUESTION was raised in this case upon the construction of the will of Clarke Wiggins, a working jeweller, dated the 17th of September, 1809, which was in the following terms:—"First, I will and direct that all my just debts, funeral expenses, and the expenses of

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 741.

<sup>2</sup> 21 Law J. Rep. (N. S.) Chanc. 742.

*Wiggins v. Wiggins.*

proving this my will be fully paid and discharged by my executrix hereinafter named, as soon as conveniently may be after my decease. And I hereby give and bequeathe to my dear wife, Ann Wiggins, all and every my stock in trade, working jewelry, and implements of every description whatsoever, and also all my book debts, sum and sums of money due or owing to me from any person or persons whomsoever, all the ready cash that may be in my house at the time of my decease, money in the public stocks or funds, bills, bonds, notes, or other securities whatsoever, for and during the term of her natural life, if she shall so long continue my widow. But it is my mind and will that at her death, or in case she marry again after my decease, then that the said stock in trade, moneys, debts, and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit, for and during the term of her natural life, if she shall so long continue my widow, shall belong to, and I do hereby give and devise the same to be equally divided, share and share alike, among the children that I now have, or may hereafter have by my said wife. But in case my wife, Ann Wiggins, shall not marry again after my decease, then I do hereby will and direct that she shall peaceably have and enjoy, and I do hereby give and bequeathe to her all and every my personal estate and effects whatsoever, for and during the term of her natural life, and the same to be equally divided to and amongst such of my children as shall be living at her decease, share and share alike. And I do hereby appoint my said dear wife sole executrix of this my will; hereby revoking all former wills by me at any time heretofore made."

The testator died soon after the date of his will (which was proved on the 5th of October, 1809) leaving his widow and six children surviving him. A suit was then instituted by the children against their mother for an account, and upon a decree in the suit, the property of the testator was ordered to be brought into court. The widow having lately died, leaving three children only surviving her, the said three children presented a petition, praying that they might be declared entitled to the money equally between them. This was opposed by the representatives of the three deceased children who claimed to be entitled to share in the property.

*Mglin* and *Eddis*, in support of the petition, contended that there were two distinct clauses in this will. In the first, provision was made by the testator for his widow marrying again, and in that case all his children were to share equally in the property; but, in the second clause, the testator provided that if his widow should die without marrying again, those children only who should be alive at her decease, were to take. It was clear that the testator intended to give the whole of his property in both clauses. The second event contemplated was that which happened, and consequently the petitioners, who were the only children alive at the death of the widow, would be entitled to the whole of the property, equally to be divided between them.

The following cases were cited: *Sharrett v. Bentley*, 2 Myl. & K.

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Wiggins v. Wiggins.

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149; *Morrall v. Sutton*, 1 Ph. 533; s. c. 14 Law J. Rep. (n. s.) Chanc. 266.

*Chandless* and *Fisher*, contra, submitted that the evident intention of the testator was to provide for all his children; but if the latter clause were to prevail, independently of the first, the issue of deceased children would be wholly unprovided for. The first clause was, in fact, a specific bequest, and the latter clause was a residuary bequest. If it were held that both clauses comprised the whole of the property, then they would be repugnant, and the general intention of the testator must be collected from the whole will. There could be no reason for supposing that, in the event of his widow marrying again, the testator meant to give the property to all his children, but if she should not marry again, then only to such children as were living at her death; such an intention would be repugnant to common sense.

The following authorities were cited: *Cook v. Oakley*, 1 P. Wms. 302; *Rawlings v. Jennings*, 13 Ves. 39; *Sims v. Dougherty*, 5 Ves. 243.

*Judgment reserved.*

May 5. *KINDERSLEY, V. C.* This will is very inartificially and inaccurately drawn, but one thing is clear, namely, that it was the testator's intention that his widow was to have the whole of his personal estate during her life, provided she so long continued his widow; and after her death, or after her second marriage, it is also clear that he meant the property to go to some class or classes of his children, either to all, or to some class; and with regard to the benefit which he intended for the wife, it was that her life interest should be determinable on her second marriage.

Now, the last clause in the will is as distinct as it is possible for any thing to be. "In case my wife shall not marry again, then I hereby will and direct that she shall peaceably have and enjoy, and I do hereby give and bequeathe to her all and every my personal estate and effects whatsoever, for and during the term of her natural life." So far, nothing can be more plain and distinct, but that if she continues single and his widow after the testator's death, she is to have and enjoy the whole of his personal estate and effects whatsoever during the term of her natural life; then it goes on, "and the same to be equally divided to and amongst such of my children as shall be living at her decease, share and share alike." So far, of course, if there had been nothing more in the will it is clear that there never could be an argument raised on the question, and that is the very event which has happened.

But then there is the clause in the prior part of the will, on which the question is raised, whether that prior part of the will does not vary the construction which ought to be put on the plain words of the last clause. By that prior part of the will the testator has purported to give to his wife (not in terms) all and every his personal estate whatsoever, by description, in this way, "all and every my

stock in trade, working jewelry and implements of every description whatsoever," that is a specific portion; "also all book debts," that is another specific portion; "sum and sums of money, ready cash in my house," &c., that is another specific portion of the personal estate; "money in the public stocks or funds, bills, bonds, notes, or other securities," and so on. In this manner he gives a variety of goods and chattels personal, not in terms, comprising the whole of his personalty; indeed, it is clear that he could not have intended to comprise the whole of his personal estate, because in the very next branch of the will he mentions another kind of personal property, which he knew that he had, and therefore merely meaning to describe some parts, "for and during the term of her natural life, if she shall so long continue my widow; but it is my mind and will that after her death, or in case she marry again after my decease, then that the said stock in trade, moneys, debts, and effects" (the whole of which he had before described,) "and also all my household furniture, which I hereby give to her for her sole use and benefit, for and during the term of her natural life, if she shall so long continue my widow, shall belong to," (that is another specific portion of personal estate;) "and I do hereby give and devise the same to be equally divided share and share alike among" (not the children living at her death, or at her second marriage, but among) "the children that I now have or may hereafter have."

Now, I observe, that the testator's will is dated the 17th of September, 1809, the precise date of his death is not stated, but I find that the will was proved on the 5th of October, 1809,—that is, the will was proved eighteen days after the date of the will, and I must, therefore, presume that the testator must have died almost immediately after making his will,—a very few days after; and I think, at least, that it is a fair presumption, that what his personal estate consisted of at the time of his death was precisely the same as at the execution of the will, nothing being shown to the contrary; and it therefore appears, and I think I may fairly assume, that it was the same personalty which he had just before been describing. It appears to me that I may fairly suppose that in the prior portion of the gift, although he describes it only by specific items, he did, in fact, describe *seriatim* the whole of his personal estate. I at first thought it possible that the prior gift was only a specific bequest, and the latter a general residuary clause; but I think I may fairly assume that the residuary clause would, in that case, have been expressed in special terms; here he says, "all and every my personal estate and effects whatsoever," and that is all that is capable of constituting a residuary clause; but looking at the whole of the will, the question is, whether the prior clause is not inaccurately expressed, in making that prior clause depend upon the residuary clause. Looking at the whole will, therefore, it appears to me that it was a very fair interpretation, which was suggested by counsel, that the first clause meant to apply to the case of the widow marrying again; and the second, not marrying again; but that both clauses meant to deal with the whole personal estate; why he should direct that if she did marry

*Gray v. Gray.*

again, the property was to be divided between all the children, but if not, to go to the children living at her death, I confess I do not quite understand, although he might have had a reason; as it stands, however, it appears merely capricious, but it does not appear to me to be worth consideration. Then, it might have happened that a child might have married, died, and left issue during the widow's life, which would have been unprovided for; but that consideration is not enough to lead to the conclusion that the prior clause was merely giving specific portions, the remainder to be given by a residuary clause; and another consideration which tends to confirm my view is, that if, as the plaintiff contends, the latter clause is a residuary clause only, and the prior, specific; then in the event of the widow marrying again, the residuary personal estate is entirely undisposed of during the remainder of her life; this would produce an intestacy, because the residuary estate would thus be undisposed of; but this is not, therefore, conclusive. Upon the fair construction of the will, I think, there must be a declaration that, in the events which have happened, the whole personal estate, on the death of Ann Wiggins, should go to the three children who survived her.

GRAY v. GRAY.<sup>1</sup>

April 21, and May 8, 1852.

*Trust, Intention to create.*

A testatrix, by her will, gave 2,000*l.* stock to two trustees, in trust, to pay the dividends to the plaintiff for her separate use; and after making her will, she expressed her intention of giving a further sum of 2,000*l.* to the plaintiff upon the same trusts. One trustee died during the life of the testatrix; the surviving trustee transferred two separate sums of 2,000*l.* stock, at two different times, into her own name, and gave the plaintiff a power of attorney to receive the dividends upon both sums. There was evidence to prove that the trustee knew of the desire of the testatrix to give the second sum of 2,000*l.* to the plaintiff, and that the trustee had expressed her intention of carrying that desire into effect. The trustee afterwards became of unsound mind:—

*Held*, that the second sum of 2,000*l.* so transferred by the trustee was sufficiently impressed with a trust in favor of the plaintiff.

This bill was filed by Harriet Gray, a legatee under the will of Mary Margaret Cave, against the executors of the will, for the purpose of obtaining a declaration that a sum of 2,000*l.* reduced annuities, which had formed part of the testatrix's estate, was impressed with a trust in favor of the plaintiff. The testatrix, by her will, dated in November, 1843, gave a sum of 2,000*l.* 3*l.* per cent. consols, part of a larger sum in the same stock standing in her name, to her brother, David Cave, absolutely. She also gave the sum of 2,000*l.*, consols, to David Cave and her sister, Cecilia Cave, in trust, for the

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 745.

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benefit of the plaintiff, Mrs. Gray, who was also a sister of the testatrix, during the life of herself and her husband, for her separate use; and if the plaintiff survived her husband, then the said 2,000*l.* stock was to be for her own use, but if she died in his lifetime, then the said stock was to fall into the residuary personal estate of the testatrix. And the residue of her personal estate the testatrix gave to Cecilia Cave.

After the date of the will, David Cave, the brother of the testatrix, died; and the bill alleged that the testatrix, previously to her decease, had intimated to Cecilia Cave, her sister and the only surviving trustee of her will, that, in consequence of the death of her brother David, she wished to alter her will, and to give the sum of 2,000*l.*, which she had bequeathed to David Cave, to the plaintiff, in addition to the other 2,000*l.* which she had given her by her will. That the testatrix was, for some months before her decease, in a very weak and infirm state of health, and had not sufficient strength, except at great personal inconvenience, to attend to any alteration in her will, but that she had exacted a promise from Cecilia Cave that the said 2,000*l.* so bequeathed to David Cave should be given to the plaintiff.

In support of these allegations, there was the evidence of W. Woodward, a nephew of the testatrix, who deposed that, after the death of the testatrix, and on the 29th of July, 1845, he had accompanied his two aunts, the plaintiff, Mrs. Gray, and the defendant, Cecilia Cave, to the Bank of England, and was present when the said Cecilia Cave executed two transfers of stock, each of 2,000*l.* consols, which had formed part of the testatrix's estate, into her own name. That the transfers were effected by a stockbroker, named Chant, who at the time suggested that, as one of the sums of 2,000*l.* was to be held by the said Cecilia Cave in trust for the plaintiff, and the other sum of 2,000*l.* was for her own benefit, it would be better that the two sums should be placed in different stocks; and accordingly one of such sums was transferred in the name of Cecilia Cave into the 3*l.* per cent. reduced annuities and the other sum was allowed to remain in the 3*l.* per cent. consols. That upon the occasion of such transfers being made, the said Cecilia Cave stated to the deponent that she knew it had been the intention of the testatrix, Mary Margaret Cave, to increase the legacy to the plaintiff to 4,000*l.* in consequence of the death of David Cave. That the testatrix had mentioned this intention to her upon several occasions, and had desired her to carry out this intention, saying, she wished her sister, the plaintiff, to have the other 2,000*l.* upon the same trusts, as the original legacy bequeathed to her. The deponent further stated that the said Cecilia Cave had declared to him that she should carry out her late sister's instructions.

There was also evidence to prove that on the 12th of August, 1845, the said Cecilia Cave added 2,000*l.* to the said 2,000*l.* 3*l.* per cent. reduced annuities, making the sum 4,000*l.*; and that the plaintiff had ever since received the dividends upon the whole sum of 4,000*l.* under a power of attorney executed by Cecilia Cave. It further appeared that Mr. Chant, the stockbroker, was still living,



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but had become subject to infirmity of memory, and was unable to give any testimony regarding this transaction; and that Cecilia Cave had, since these transactions, become of unsound mind.

*Walker and Terrell*, appeared for the plaintiff, and cited *Ex parte Pye*, 18 Ves. 140; *Thorpe v. Owen*, 5 Beav. 224; s. c. 11 Law J. Rep. (N. S.) Chanc. 129; *Ouseley v. Anstruther*, 10 Beav. 453; *Weckett v. Raby*, 2 Bro. P. C. 386.

*Willcock and Taylor* appeared for the defendants.

*Welch*, for the residuary legatee.

Judgment reserved.

May 8. KINDERSLEY, V. C., after stating the facts of the case, said, The question here is, whether the second sum of 2,000*l.* transferred by Cecilia Cave into her name in the reduced bank annuities is so completely impressed with a trust in favor of the plaintiff that it can be enforced in a court of equity. When the case was argued, I felt some doubt about it; but I must confess that, after consideration, I have come to the conclusion, that there is a complete trust. There is no doubt whatever that the first sum of 2,000*l.* 3*l.* per cent. reduced annuities, which was bought and transferred into the name of Cecilia Cave on the 29th of July, was a complete appropriation of that sum to satisfy the legacy to the plaintiff given by the will, for it was transferred into her name as the sole surviving trustee. No doubt, if David Cave had been living it would have been placed in the joint names of him and of Cecilia Cave. By the evidence of Mr. Woodward (the nephew of the plaintiff and of Cecilia Cave), who does not appear to have any interest in the matter, it is sufficiently proved, as against Cecilia Cave, that it was the intention of the testatrix to have increased the legacy to the plaintiff, and that she meant to carry out what the testatrix had desired. Then it appears that on the 12th of August, after the first 2,000*l.* had been transferred, Cecilia Cave again went to the same stockbroker, Mr. Chant, and bought a second sum of 2,000*l.*, which was also transferred into her name, and she, at the same time, executed a power of attorney authorizing the plaintiff to receive the dividends upon the whole sum of 4,000*l.* The only doubt in my mind has been, whether Cecilia Cave parted with the stock. She certainly retained the legal title; but it is clear that the only way she had of carrying out what she herself said was the intention of the testatrix was by doing exactly what she did. She was the only surviving trustee of the will, and she was bound to place the additional sum in her name as trustee upon the same trusts as the original sum. It is true that she might have executed a deed declaring the trusts of both sums. That course, however, was not necessary with reference to the original legacy of 2,000*l.* in order to make the investment of it a due appropriation, and if not necessary for the original legacy, it was not

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*In re Townsend.*

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necessary in order to constitute a trust in respect of the further sum of 2,000*l.* The rule is, that if the person creating the trust has distinctly expressed the purpose of his act, and has done all that is necessary to complete the intention, the court will hold the trust completely imposed; and this case appears to me to come within that rule, since Cecilia Cave did all that was necessary to impress a trust on the stock in question. Since these transactions Cecilia Cave has unfortunately become of unsound mind; and Mr. Chant, the stockbroker, who might have proved the transaction, has become subject to an infirmity of memory, so that I must decide the case upon Mr. Woodward's evidence, which is confirmed by the transactions themselves. Under all the circumstances, I shall make a declaration that the second sum of 2,000*l.* reduced annuities was impressed with the same trusts as the original legacy.

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*In re TOWNSEND.*<sup>1</sup>

January 27, 1852.

*Lunacy — Funeral of a Deceased Lunatic.*

A lunatic died without leaving ready money to pay the expenses of his funeral, and of whose person or of whose estate there was no committee. The heir at law, who was one of the next of kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for such purpose; but the court directed the persons with whom the lunatic had resided to proceed with the funeral, and ordered the petition to stand over.

A petition for this purpose is necessary; a warrant from the Lunatic Office is not sufficient.

This was the petition of the heir at law and one of the next of kin of the lunatic, Mr. Townsend, which, after setting forth that there was no committee of either the person or estate, although one had been approved of by the Master in Lunacy, and that the lunatic had died on Friday, the 23d of January (then instant), but there was no money in the house to defray the expenses of the funeral, prayed that the court would order a sufficient sum out of the money standing to the credit of the lunatic to be paid to the petitioner for the purpose of burying the deceased, the petitioner undertaking duly to apply it.

Grove, in support of the petition, stated that the petitioner was a nephew of the lunatic, who had lived with him. The petitioner's wife had had an allowance of 50*l.* a year out of the lunatic's estate, for her trouble in attending upon him, but since the death of the committee of the estate, in October last, no part of that money had been paid.

Follett, for the other next of kin and for the person who had been

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 747.

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*In re Noble.*


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approved of as the new committee, appeared to oppose the petition, as being wholly unnecessary and a burthensome expense on the lunatic's estate. The report of the Master, approving of the new committee, had not been confirmed; and the proper course would have been for the petitioner to have gone to the lunacy office, and taken out a warrant for the purposes proposed to be effected by the present petition.

The officer from the lunacy office, who was in attendance, stated to the court that a petition was the proper course.

[LORD CRANWORTH, L. J. A petition is necessary. Is any one making preparation, so far as can be, for the funeral?]

*Grove.* Yes; the petitioner and his wife are doing so as far as they are able, but they are poor people, yet they are willing to continue in the performance of that duty. The lunatic has made a will, which is sealed up, and is in the lunacy office, and it is proposed that the same shall be opened, in order to see whether the lunatic has given any directions.

KNIGHT BRUCE, L. J. Let there be no unseemly wrangle or dispute to interfere with the performance of the last offices to this lunatic. Let the will be opened, the funeral be completed, and the petition in all other respects stand over.

LORD CRANWORTH, L. J. *Prima facie* the nephew and his wife, with whom the lunatic has lived, are the most proper persons to be engaged in such a matter. Let them proceed with the funeral, but we can now give no directions as to payment; as to that the petition must stand over.

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*In re NOBLE.*<sup>1</sup>

January 28, 1852.

*Lunacy—Payment of Lunatic's Allowance to a Survivor of two Committees.*

Two committees of the estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place. The estate being small, the court permitted the income to be paid to the survivor on the production of an affidavit of his solvent circumstances.

THE petition in this case stated, that two committees of the estate and one of the person of the lunatic had originally been appointed, but that one of the committees of the estate had died, but no new

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 748.

*In re Swindell.*

committee had been appointed in his place; that the estate of the lunatic consisted solely of consols, the dividends of which produced a few shillings over 100*l*. a year; that the Master had reported that it was proper that the whole income should be applied for the lunatic's maintenance, and that that had been hitherto done; that the expense of the appointment of a new committee would seriously deduct from this small income, and that, therefore it would be for the benefit of the lunatic that such expense should be saved. The petition then prayed that the income might be paid to the surviving committee alone.

*Osborne* appeared in support of the petition.

*Cottrell*, for the next of kin, offered no opposition.

LORD CRANWORTH, L. J. Is there any evidence as to the solvency of the surviving committee? It may be very right to appoint A and B committees, and to entrust them with the lunatic's income, but it may be far from proper that B alone should be trusted. If such an affidavit as I have adverted to is produced to the officer, and it is satisfactory to him, I think, to save expense, as the estate is so small, the order may be made.

KNIGHT BRUCE, L. J. I quite concur in the view that some account should be given of the solvency of this gentleman. On the production of a proper affidavit, let the order be made.

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*In re SWINDELL.*<sup>1</sup>

April 30, 1852.

*Lunacy — Committee — Loss to Estate — Liability.*

A sum of money having been lost to the estate of the lunatic under circumstances which the court considered to be the fault of the committee in not taking steps to enforce payment, the estate of the committee, who had died, was charged with the same.

THE question on this petition, which came on for the confirmation of the report of the Master in Lunacy, related to the liability of the estate of a deceased committee to make good a sum of money. Mr. John Rose Swindell was, on the 21st of February, 1828, found a lunatic, and Mr. Thomas Pearsall was, in July following, appointed committee of his person and estate, and so continued until his death in the latter end of November, 1838. Mr. B. T. Balguy acted for Mr. Pearsall during the whole time as his solicitor in the matter of

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<sup>1</sup> 21 Law J. Rep. (n. s.) Chanc. 742.

the lunacy. In February, 1838, Mr. Balguy became bankrupt, and in May following obtained his certificate. On the 19th of March, 1839, after a considerable contest between Mr. Edward Ordish and other parties, in which Mr. Balguy acted as his solicitor, Mr. E. Ordish was appointed committee, and he continued Mr. Balguy as his solicitor, both in the matter of the lunacy and in his private affairs, down to the month of October, 1842. In October, 1839, Mr. Balguy offered to occupy the mansion-house called Borrowash House, part of the lunatic's estate, at the rent paid by the former tenant, namely, 132*l.* a year; and Mr. Ordish agreed, and, accordingly, Mr. Balguy became yearly tenant at that rent. Mr. Balguy's costs for the litigation, on the appointment of the committee, were taxed at 98*l.* 3*s.*, and were subsequently paid by Mr. Ordish. Mr. Balguy occupied the house until Michaelmas, 1843, but he was discharged from his office of solicitor to the committee in October, 1842. No rent was paid. After Mr. Balguy's discharge as solicitor, Mr. E. Ordish employed Messrs. Jessopp in his place, and they, by their client's direction, put a distress into Borrowash House for rent, but in consequence of the insufficient value of the levy and the promise of Mr. Balguy to pay off the money by yearly instalments of 100*l.*, and to pay down 100*l.*, which was more than the value of the goods, the distress warrant was withdrawn. Mr. Balguy paid the 100*l.*, and afterwards 79*l.* was realized by a sale of some of his property. Mr. Balguy, in March, 1843, had executed a warrant of attorney to confess judgment for the whole of the arrears, 395*l.* Mr. Ordish never enforced the warrant of attorney, and part of the money was ultimately lost, but in passing his accounts before the Master, as stated in an affidavit, he called attention by his solicitors to the fact of the arrear, "but the Master acquiesced in the course adopted by the said E. Ordish in delaying to put the judgment in execution against the said Bryan Thomas Balguy."

Mr. E. Ordish died, in August, 1851, intestate, and letters of administration of his estate were granted to his son, Mr. John Pearsall Ordish, in March, 1852. The Master reported that the money was not lost by the wilful default of the committee, and that the administrator of his estate ought not to be charged therewith. It now shortly appeared that besides the 395*l.* there was subsequently due one more year's rent, but the committee having received the 100*l.* and 79*l.*, and having paid the 98*l.* 3*s.* costs to Mr. Balguy, on account of the lunatic's estate, the amount ultimately lost was the difference between those sums.

*Swanston* and *Smythe*, for the administrator, in confirmation of the report, relied on the Master's finding, and on the fact that it was reasonable that the tenant should not pay rent when costs would accrue to him.

*Roll* and *J. V. Prior* contended that the administrator ought to be charged, but were willing to allow to him the 98*l.* the committee had paid for costs. They claimed the whole of the loss extra, that, as having been occasioned by the wilful neglect of Mr. E. Ordish.

*In re Cumming.*

LORD CRANWORTH, L. J. This is a very distressing case, and a very objectionable one. This committee chooses to employ, as his solicitor, a gentleman who had been but a few months before a bankrupt, and had re-established himself. The first act done by the committee, after this, is, that he lets this house to his own solicitor,—a very objectionable proceeding,—at a rent of 132*l.* per annum. The solicitor continues tenant for four years, and never pays a sixpence of rent. Being the solicitor to the committee up to nearly the fourth year of his tenancy, or rather to the end of the third year, about the third year he is dismissed, and continues tenant for a year afterwards. The question is, whether, there having been no rent received, except a certain sum on account, that was not lost through the fault of the committee in not enforcing its payment. The only excuse is, that there were accruing costs, which is put into his mouth by his solicitor himself, putting that as a sort of set-off against the payment of rent. Eventually there are no costs, except the 98*l.*, which the parties are willing to allow to be deducted, and the whole of this rent, except the two sums of 100*l.* and 79*l.*, is lost. No other conclusion can be arrived at than an answer in the affirmative to the question I have stated, because the committee has been wanting in that vigilance which the court is bound to require from one holding that fiduciary situation. I am extremely grieved that such is the result at which I am bound to arrive; but considering how important it is to keep strict guard upon the conduct of persons undertaking to watch over those who, by the visitation of God, are incapable of taking care of themselves, there is no other conclusion to be arrived at but to charge the committee with the whole amount of 395*l.*, but to give him credit for the 100*l.* and the 79*l.*, then adding another year's rent, after deducting from it the 98*l.* the amount of costs he paid to Mr. Balguy.

KNIGHT BRUCE, L. J., intimated his concurrence.

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*In re CUMMING.*<sup>1</sup>

April 2, 1852.

*Lunacy—Care of a Lunatic's Person and Application of the Estate pending a Traverse.*

Where, in the opinion of the court, it will be for the benefit of the lunatic that the care of the person should remain undisturbed, it will so direct, and will direct the whole of the income of the property to be paid to the lunatic, pending a petition to traverse; although the court will confirm the report of the Master in Lunacy, appointing a committee of the person and a committee of the estate.

At the time (after the hearing of the lastly reported case) when

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 758.

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*In re Cumming.*

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the residue of Mrs. Cumming's petition for a traverse was heard before the lords justices, a petition also came on for hearing, presented by the next of kin and co-heiresses at law, on the 4th of February, 1852, which prayed the confirmation of the Master's report, approving of Miss L. Baker as committee of the person, and Mr. James Spark as committee of the estate of Mrs. Cumming, and for other purposes as to costs. By orders made on the 20th of November and the 22d of December, 1851, arrangements were made, under the sanction of the court, for the personal care and comfort of the lady.

*Sir W. P. Wood* and *W. Morris*, in support of the petition, urged that it was important to provide in the ordinary way for the safety of the lunatic and her property, pending the traverse, and that as, until the traverse had been heard, the lady must be treated in all respects as insane, and her property be administered accordingly, the court should proceed in the ordinary manner by confirming the Master's report. If, however, the counsel for Mrs. Cumming could show any good reason for a contrary course, the matter might be different.

*Bethell*, *Roundell Palmer*, and *Southgate*, argued that, with regard to this particular case, it was of the utmost importance that no change should be made in the establishment of the lunatic pending the traverse. That if the Master's report was confirmed, appointing a committee of the person, and Mrs. Cumming was placed in the hands of the friends of those who sued out the commission, and deprived in consequence, either wholly or to a great extent, of intercourse with those friends in whose good wishes and upon whose advice she relied and was now proceeding, she would not have it in her power to contest, in a fair and proper manner, the validity of those proceedings, by which she was declared a lunatic and unfit for the management of her own affairs. It was not shown that the person who resided with Mrs. Cumming was not in every way a proper and fit person to be with her. With regard to the appointment of a committee of the estate, the property was not of such a nature as to render such an appointment at the present time a matter of immediate necessity or expediency. That in such cases the court had full power to act according to its own discretion; and in this particular case, the evidence showed that if the proceedings were not stayed, according to the prayer of the petition of Mrs. Cumming, not only would her comforts and health be most materially affected, but even the administration of justice in a fair and impartial manner would be endangered. That pending a traverse, the stay of proceedings, before the passing of the 6 Geo. 4, c. 53, would have been a matter of course. That it was not the object of the legislature by that statute to make it imperative upon the court to take proceedings, as if the right to traverse the inquisition was not conceded, and as if the validity of the commission was not called in question. That statute was merely passed in order to give jurisdiction to the court in matters wherein it was defective.

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Evans v. Prothero.

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KNIGHT BRUCE, L. J. It is my opinion that the benefit of Mrs. Cumming will be best consulted by interposing not at all, or as little as possible, with the system of personal care of her which exists at the present time. No sufficient reason has been shown why the committees shall not be appointed, or why the grant shall not take place, care being taken that the income of the property shall be received by her as if the grant were not made. The present system of personal care shall not be interfered with till further order. I think, therefore, that the petition should stand over so far as relates to costs.

LORD CRANWORTH, L. J., concurred.

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EVANS v. PROTHERO.<sup>1</sup>

April 16, 1852.

*Evidence — Contract for Sale — Unstamped Receipt.*

A document, purporting on the face of it to be a receipt for purchase-money, but inadmissible as evidence of the payment of the money for want of a sufficient stamp, is nevertheless admissible as evidence of the agreement for sale, if it contain the requisite terms — *Sembla*.

*Vide* s. c. 20 Law J. Rep. (N. S.) Chanc. 448; 2 Eng. Rep. 83, *contra*.

THE facts of this case are fully stated in the report of the motion for a new trial, 20 Law J. Rep. (N. S.) Chanc. 448, s. c. 2 Eng. Rep. 83. On that occasion Lord Cottenham was of the opinion that the following document, purporting to be a receipt for the purchase-money, but which was, originally, impressed with a sixpenny receipt stamp only, had been improperly admitted as evidence of the contract; and he granted a new trial accordingly.

"Received this 25th day of August, 1827, of Mr. Jenkyn Richards, now and before, the sum of 21*l*., being the amount of the purchase for three tenements sold by me, adjoining the river Taff. Received the contents,

† EVAN RICHARDS."

"Witness, John Swaine."

The case came on for trial, in July, 1850, before Baron Parke, when the plaintiff's counsel tendered the document in evidence, but its reception being objected to, the objection was allowed by Mr. Baron Parke. The jury, notwithstanding, found in favor of the plaintiff on both issues.

A motion was then made, before Knight Bruce, V. C.; for a new trial of the issues, and was refused. The defendants now appealed from that order. The grounds of the motion were, that, after the decision of Lord Cottenham, the plaintiff ought not to have tendered this document; and that, notwithstanding the objection was allowed by the judge, the minds of the jury had been unduly influenced by its production.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 772.



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Evans v. Prothero.

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*Walker* and *Pulling*, for the defendants, contended that to render the document admissible for any purpose it ought to have been stamped according to its legal character; and they referred to Lord Cottenham's observations (20 Law J. Rep. (n. s.) Chanc. 450, s. c. 2, Eng. Rep. 83), distinguishing the present case from *Matheson v. Ross*, 2 H. L. Cas. 286. They cited also, *Beeching v. Westbrook*, 8 Mee. & W. 411; s. c. 10 Law J. Rep. (n. s.) Exch. 464; *Hawkins v. Warre*, 3 B. & C. 690; *Jones v. Ryder*, 4 Mee. & W. 32; s. c. 7 Law J. Rep. (n. s.) Exch. 216; *Doe d. Wyatt v. Stagg*, 7 Scott, 690; s. c. 5 Bing. n. c. 564; 9 Law J. Rep. (n. s.) C. P. 73.

*W. M. James*, for the plaintiff, was not called upon.

The LORD CHANCELLOR, after observing upon the facts of the case, and reading the document purporting to be a receipt for the purchase-money of the property in question, proceeded to the following effect:—This document, if receivable in evidence, would have proved the plaintiff's case undoubtedly. I am strongly of opinion that this document was admissible as evidence of the agreement; for, on the face of it, it has every ingredient necessary to constitute a valid agreement within the Statute of Frauds. It contains the names of the seller and buyer, a description of the property sold, and the amount of the purchase-money. If I were to direct a new trial, I should not exclude this document, holding the opinion I have expressed, that it is admissible as evidence of the agreement. Two questions were sent to the jury: first, whether there was a contract for sale; and, secondly, whether any money was paid. This document having been rejected for want of an additional sixpenny stamp, and the defendants having brought forward a cloud of witnesses as to conversations, the judge put the case to the jury thus:—"If you believe the evidence for the defendants, there is an end of the plaintiff's case." The verdict was for the plaintiff, showing that the jury disbelieved the defendants' witnesses. My firm impression is, that if I sent the case for a further trial, the jury would come to the same conclusion. I am perfectly satisfied that in refusing this motion, I am not only saving the parties from ruinous litigation, but am furthering the ends of justice upon the merits. The motion must be refused, with costs.

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Wright v. Wright.

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WRIGHT v. WRIGHT.<sup>1</sup>

June 8 and 9, 1852.

*Will — Construction — Condition — Direction to Pay.*

A testator gave the residue of his estate to trustees, upon the usual trusts for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M. and N. during their minorities, or for apprenticing them, as his trustees should think proper; and declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the moneys unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M. and N. were both lunatic at the time of their attaining their majority: —

*Held*, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely.

WILLIAM WRIGHT, by his will, dated the 3d of September, 1813, devised and bequeathed all his real and personal estate to Lupton Wright, William Wright, and John Lambert, their heirs, executors, and administrators, upon the usual trusts, for sale and conversion into money, and directed that, out of the moneys arising thereby, certain legacies therein mentioned should be paid to his daughters Hannah and Isabella. The will then proceeded as follows: — “And also that they, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall, from and out of the said moneys, pay and apply such sums of money for the maintenance and education of my said sons Joseph Wright and Jonathan Wright, during their minorities, and for apprenticing them to any trade or business, and paying any fee or fees in respect thereof, as they, my said trustees, shall think most proper and for their advantage; and when they, my said sons, shall have attained their said respective ages of twenty-one years, then, upon trust, that they, my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, shall pay all the then residue of the moneys which may have arisen from my said real and personal estates as aforesaid unto my two sons, Joseph Wright and Jonathan Wright, in equal parts and proportions, share and share alike, as tenants in common, for their own respective use and benefit; provided that they, my said sons, shall be at that time, in the opinion of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, of competent understanding and sufficient discretion to manage and take due care thereof; and, if it shall happen that either of my said sons shall die during his minority, then my will is, that the part and share of such son so dying shall be paid unto the survivor of them my said sons, upon his attaining his said age of twenty-one years, provided he shall then be of sufficient discretion to manage and take proper care thereof. And my will is and I do hereby direct that my said trustees and the survivors or survivor of them,

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 775.

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Wright v. Wright

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and the executors and administrators of such survivor, shall, from time to time, as occasion shall require, during the minority of my said children, place out at interest, upon some sufficient mortgage security or securities, all the moneys which they may receive from and in respect of my said real and personal estates, except what may be then paid and applied in discharge of my debts, funeral expenses, and the charges of my will, and in the maintenance and education of my said children during their minorities, or in the payment of any apprentice fee or fees to be paid upon the apprenticing of my said sons to any trade or business as aforesaid."

The testator died soon after the date of his will. Joseph Wright attained his majority in 1819, and Jonathan in 1823. Jonathan Wright afterwards died.

The will was proved by Lupton Wright, William Wright, and John Lambert. William Wright died in 1825, and John Lambert in 1840. Joseph Wright had been found a lunatic.

The bill was filed in 1851 by Joseph Wright, by his committee, and the administratrix of Jonathan Wright, against the surviving trustee and the representatives of the deceased trustees, for the administration of the estate of the testator.

It appeared that Joseph Wright and Jonathan Wright were both lunatics at the time of their attaining their majority, and it was stated in an affidavit of Mr. Lupton Wright, the surviving trustee, that, in his opinion, and, as he believed, in the opinion of his co-trustees, they were not of competent understanding and sufficient discretion to manage and take due care of property on their attaining their majority.

*Roll and Prior*, for the plaintiffs.

*Malins and Amphlett*, for the defendants.

PARKER, V. C. The question in this case is, whether Joseph and Jonathan Wright who both attained their majority, took absolute interests under the will, or whether the gift to them was subject to the condition that, at that time, they should be, in the opinion of the trustees, of competent understanding to manage and take due care of the subject of the gift. Considering the anxious provision which the testator has made for them until their attaining twenty-one, to take effect, not only out of the income, but the *corpus*, the gift over as between themselves in case one should die under age, and the general scheme of the will, it seems to me that the testator was making a complete disposition of his property. I think that the construction of the will which would make the provision for the sons conditional on their being of competent understanding to take care of the property would be against the intention of the testator. I think that the provision as to being of competent understanding was not annexed to the gift, but is a part of the direction to pay. Such a qualification as to the direction for payment does not, in my opinion, make the gift conditional. I think, then, that the two sons took absolutely.

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*Ex parte* The Rector of Lea — Moorhouse v. Colvin.

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*Ex parte* THE RECTOR OF LEA.<sup>1</sup>

June 10, 1852.

*Investment of Money arising from Sale of Lands belonging to a Corporation to a Company.*

Order made on a petition by a rector for the investment of the money arising from the sale to a railway company of a part of the rectory lands. Pending the proceedings in the Master's office the rector died. The new rector consenting that the proceedings should go on, no supplemental order necessary — *sansle*.

ON the petition of the Rev. D. Legard, rector of Lea, an order was made that the Master should inquire as to the propriety of a purchase of, and as to the title to, some land proposed to be bought with the purchase-money of some land belonging to the rectory, which had been taken by a railway company.

Mr. Legard having died during the reference to the Master, the Master declined to go on with it. A new rector was appointed.

*Nalder*, on the part of the new rector, now applied for a supplemental order.

PARKER, V. C., said that, assuming the present rector to be a consenting party, he thought that the Master might proceed with the reference without a supplemental order. If any difficulty was felt, the Registrar might draw one up.

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MOORHOUSE v. COLVIN.<sup>2</sup>

July 1 and 2, 1852.

*Marriage Contract — Promise — Portion.*

A father bound himself to give his daughter a marriage portion of 2,000*l.*, and said that she was and should be noticed in his will. He had previously made a will, giving her a lac of rupees; but afterwards he made another will, which, after giving all his property to his wife for life, and then to his two sons, gave the same, if they should die without issue, to his daughter's issue: —

*Held*, affirming a decree below, that there was no contract by the father to give more than the 2,000*l.*

THIS was an appeal, by the plaintiff, against a decree of the Master of the Rolls, pronounced on the 4th of December, 1851, and which, with the whole facts of the case, are fully reported, 21 Law J. Rep. (N. S.) Chanc. 177; s. c. 9 Eng. Rep. 137.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 776.

<sup>2</sup> 21 Law J. Rep. (N. S.) Chanc. 782.

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*Moorhouse v. Colvin.*

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*Bethell* and *Toller* appeared for the appellant.

*W. P. Wood, Willcock, Anderson, G. W. Collins, Giffard, and W. Morris,* for the respondents.

LORD CRANWORTH, L. J. This is a bill filed for the purpose of establishing the right of Mr. and Mrs. Moorhouse to a lac of rupees, that is to say, a sum of not less than 12,000*l.*, out of the estate of the late Dr. Peter Cochrane; and the foundation of this claim was a letter written by Dr. Cochrane, on the 6th of July, 1825, to a gentleman of the name of Dr. Thomas, in India, on the occasion of Mrs. Moorhouse, then Miss Cochrane, going out to that country with a view to establishing herself for life, the lady being then of the age of nineteen. Dr. Cochrane sent her to India, and simultaneously wrote a letter to Dr. Thomas. By it he bound himself to give her, on marriage, 2,000*l.* in the following terms:—"You may assure the young gentleman who may meet with your and Mrs. Thomas's approbation, that on his marriage with her he shall have 2,000*l.* sterling;" and then he adds, "nor will that be all; she is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of. I hope, however, that he will have no objection to admit of the 2,000*l.*, and whatsoever else may follow, being settled on herself and children. Should she die before him, without issue, he shall have the 2,000*l.* to himself."

Now, the real question is, what is the correct interpretation to be put on that letter? I will assume that the letter was shown to Mr. Moorhouse previous to his marriage with Miss Cochrane, and on that assumption even I still concur with the judgment of the Master of the Rolls. The letter means this, "I leave you, Dr. Thomas, in charge of my daughter. I wish her to marry, and you have my authority to say she will have 2,000*l.*, with a proviso that it shall be settled; but I further add, I have made a will, and have made a further provision, but to what amount I cannot and will not say; as to the amount of 2,000*l.* I bind myself to pay it, but no more than the 2,000*l.*" Dr. Cochrane, then, having paid the 2,000*l.*, she has no further claim on his estate.

But then it is contended that by his writing to Dr. Thomas "she is and shall be noticed in my will," he had, at any rate, bound himself not to reduce the provision made for her by will below a lac of rupees, or 12,000*l.* to which she was then entitled under a then existing will; but that is not so. The testator, in effect, says, "I have or shall make a will, but I reserve to myself full power either of increasing or reducing by it the provision for my daughter." It is a case of great hardship on Mr. and Mrs. Moorhouse, who were, doubtless, led to expect a large fortune; but we must not allow any private feelings to make us swerve from our duty. The contract is to give 2,000*l.*, and nothing more, unless it be something which is left entirely to his discretion by will; but he has given nothing. The

party might, perhaps, have a right of action, in which nominal damages could be obtained, but that the court would disregard.

The authorities the counsel for the plaintiff relied on were the cases before the house of lords, *Hammersley v. De Biel*, 12 Cl. & F. 45, and *Luders v. Anstey*, 4 Ves. 501; but both cases are distinguishable materially from the present. The question in each of those cases was, whether the expressions made use of amounted to a contract between the parties; and Lord Loughborough, in the one case, and the house of lords in the other, held that they did. Whether, on the question in *Luders v. Anstey*, all minds would have arrived at the same conclusion, it matters not; but there was no difficulty, assuming that there was a contract in that case, in knowing what was to be done; but in this case the difficulty is, even if there had been an express contract, that the court cannot tell what sum is to be given. The authorities fail, therefore, in supporting the case of the plaintiff.

On the whole, my opinion is, that this amounts to a contract to do a deed which has been done,—that he would give her 2,000*l*. The Master of the Rolls has acted correctly in dismissing the bill.

[*Toller* asked for a reference as to whether Mr. Moorhouse had the contents of the will communicated to him previous to his marriage, and whether Dr. Cochrane was aware that such communication had been made to him.]

KNIGHT BRUCE, L. J. I am most clearly of opinion that there was no contract beyond the 2,000*l*. The only question which could possibly arise would be whether, notwithstanding our opinion on that subject, a case should be directed on the question of contract to a court of law; first, on facts as they stand proved; and, secondly, with the addition of the facts which it is suggested can be proved. I do not think a case would do the plaintiff any good; but I should disregard my own view as to sending a case to law, if my learned brother thought it ought to be sent. I am not strongly impressed that a case should be sent, but if Lord Cranworth thinks it should, I shall not dissent.

LORD CRANWORTH, L. J. I do not think a case should be sent.

KNIGHT BRUCE, L. J. We both think it right to dismiss the appeal; but it must be dismissed, without costs, and the deposit must be returned.

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Pidduck v. Boulteebe.

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PIDDUCK v. BOULTBEE.<sup>1</sup>

April 19, 1852.

*Motion by next Friend — Irregularity.*

In a suit by adult plaintiffs and infant plaintiffs, an order was obtained for changing the next friends of the infants. The order was drawn up and entered. The adult plaintiffs obtained at the Rolls an order for changing the solicitor to the suit, and alleged that the order appointing a new next friend had not been drawn up and entered. The new next friend moved to discharge the order obtained at the Rolls:—

*Held*, that the order for changing the solicitor was irregular; but that the motion to discharge ought to have been by the infants by their next friend, and not by the next friend in his individual capacity.

Application refused, but leave given to amend notice of motion.

THIS bill was filed, by two adult plaintiffs and by three infants, by Elizabeth Mary Pidduck, their next friend. In November, 1851, an order was made by this court for changing the next friend, and Dr. Wardell was substituted for E. M. Pidduck. The order was drawn up and entered, and counsel appeared at the time the order was made for E. M. Pidduck.

An order of course was subsequently obtained at the Rolls Court, upon the petition of the adult plaintiffs, by which it was ordered that the petitioners might be at liberty to change their solicitor by appointing R. Pugh as such solicitor in the place of Messrs. Crosby & Co. That petition was intituled in a cause in which the two adult plaintiffs and the four infants, by their next friend, E. M. Pidduck, were plaintiffs; and it was stated that the order made by this court for changing their next friend had not been drawn up and entered.

*Stuart* now moved, on behalf of Dr. Wardell, the new next friend, to discharge the order made at the Rolls for leave to change the solicitor on the ground of irregularity, it having been made without notice to Dr. Wardell, and having falsely stated that the order appointing Dr. Wardell was not drawn up and entered. Evidence was produced to show that the order had been properly drawn up and entered.

*Follett* appeared for the defendants in the same interest.

*Willcock*, for the plaintiffs, contended that the order made at the Rolls was not irregular, since the order for changing the next friend had been made without the consent of E. M. Pidduck, the original next friend. This statement was supported by an affidavit made by E. M. Pidduck. It was also submitted that this motion could not be made by Dr. Wardell alone in his individual capacity, but should have been on behalf of the infants by their next friend.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 786.

*Stuart*, in reply.

KINDERSLEY, V. C. I cannot help thinking that some rational course ought to be taken to prevent the waste of time occasioned by all these nonsensical proceedings. All this is about the machinery of the cause, and not the merits. With regard to the question whether the order of the Rolls was regular or not, my opinion is that it was irregular. It was an application for changing the solicitor in the cause, on a suggestion that delay had taken place, and on a representation that E. M. Pidduck was the next friend of the infants, when in fact she was not, the order appointing Dr. Wardell having been drawn up and entered. Being of opinion, therefore, that the order was irregular, I should discharge it, provided the party moving to discharge had a right to do so.

Then comes the question, whether the next friend coming to the court as an individual has a right to discharge the order. I will not say that a next friend merely in his own individual capacity may not be entitled in some cases to ask for such an order, but as a general rule the next friend asks because the application is by the infants by their next friend. Now, in this case, after the order of November, 1851, Dr. Wardell became the next friend of the infant plaintiffs, and the suit was thus constituted; there were two adult plaintiffs and four infant plaintiffs by Dr. Wardell as their next friend. Some of these plaintiffs, that is, the adult plaintiffs, behind the back of the next friend of the infants, go to the Rolls and obtain an order to change the solicitor, who is solicitor for all the plaintiffs. Now, as the solicitor is instructed by the adult plaintiffs and by the next friend of the infants as such next friend, what right have the adult plaintiffs to get such an order behind the back of the next friend? It was infringing on the rights of the infants as well as their next friend. The infants, therefore, should come to discharge the order by their next friend and not the next friend in his individual capacity.

Upon these considerations, I think the objection is valid, and I cannot grant the motion. On a proper application by the infants by their next friend, I should discharge the order, but as it is I must refuse the motion.

Leave was then asked to amend the notice of motion.

KINDERSLEY, V. C., said, if amending the notice would save expense, he would allow it.



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*Barker v. Barker.*

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**BARKER v. BARKER.<sup>1</sup>**

July 15 and 16, 1852.

*Will — Construction — Period of ascertaining a Class — Issue of deceased Child — Vesting — Direction to Pay.*

A testator gave to trustees a sum of money on the usual trusts for investment, and directed them to pay the income to A, for life, and, after his death, to divide the principal between the children of A, who should be living at the time of his (A's) death, and the issue of such as should be then dead, leaving issue, so that the issue of such child so dying should take the part which their deceased parent would have taken if living, to be paid to such children and issue, upon their attaining, and in case they should live to attain, twenty-one. A had a child B, who died in his lifetime, leaving four children. Two of these children died in their infancy, in the lifetime of A. :—

*Held*, that the class to take was all the children left by B, and that the gift had vested absolutely in all those children.

THIS was a special case under Sir George Turner's Act.

P. Protheroe, by his will, dated the 30th of August, 1803, made the following bequest :—

" I give and bequeathe unto my said sons E. Protheroe and P. Protheroe, my executors hereinafter named, the sum of 22,000*l.* of lawful money aforesaid, upon trust to place the same out at interest on such security or securities as they shall think proper and approve, and to pay the interest and income arising therefrom, as the same shall be received, unto my daughter, Elizabeth Barker, wife of the said William Barker, for and during the term of her natural life, to and for her proper use and benefit ; and from and after her decease, then in trust, as to the said principal sum of 22,000*l.*, to divide the same equally between all and every the children of my said daughter, Elizabeth Barker, who shall be living at the time of her decease, and the lawful issue of such of them as shall be then dead leaving issue, so that the issue of such child so dying shall take the part or share which their deceased parent would have taken if living, and so as that such issue of each child should take equally share and share alike, to be paid to all such children and issue, upon their respectively attaining, and in case they should live to attain, the age of twenty-one years ; and, in the meantime, I order and direct that my said executors shall apply all or any part of the interest and income of the same sum of 22,000*l.*, for and towards the support and maintenance and education, or otherwise for the use and benefit, of such children and issue respectively, as my executors shall think fit.

The testator died in September, 1803.

Mrs. Barker died in 1844.

Mrs. Barker left only two children who survived her, Mrs. Miller and Susan Barker.

Mrs. Barker had another child, Philip, who died in 1838, in his mother's lifetime, having had five children. One of these children

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*Barker v. Barker.*

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died in the lifetime of his father. Two died in their infancy, after the death of their father, and before the death of Mrs. Barker, the tenant for life. The other two survived their father and Mrs. Barker.

The opinion of the court was desired as to the interests which the children of Philip Barker took in the fund.

Two questions were argued; first, at what period the class of the issue of Philip Barker was to be ascertained; and secondly, whether the vesting of the share of each child was contingent on his or her attaining of twenty-one years.

*Russell and Metcalfe, Elmsley and Carter, Bacon and Charles Hall, Piggott, Walker and Hanson* for the different parties.

The following cases were cited—

On the question of the time at which the class was to be ascertained — *Keverne v. Williams*, 5 Sim. 171; *Bennett v. Merriman*, 6 Beav. 360; *Beck v. Burn*, 7 Beav. 492; s. c. 13 Law J. Rep. (n. s.) Chanc. 319.

On the question of vesting — *Bolger v. Mackell*, 5 Ves. 509; *Knight v. Cameron*, 14 Ves. 389; *Lister v. Bradlee*, 1 Hare, 10; s. c. 11 Law J. Rep. (n. s.) Chanc. 49; *Massey v. Hudson*, 2 Mer. 130; *Packham v. Gregory*, 4 Hare, 396; s. c. 14 Law J. Rep. (n. s.) Chanc. 191; *Bull v. Pritchard*, 5 Hare, 567; s. c. 16 Law J. Rep. (n. s.) Chanc. 185; *Masters v. Scales*, 13 Beav. 60.

PARKER, V. C. There are two questions in this case. The first is, what is the class of persons who take under the gift contained in the will; and the second, whether the individuals of that class did or not take interests which vested at the death of the tenant for life. The gift is, after the death of the tenant for life, to be equally divided between all the children of the tenant for life who should be living at the time of her death (as to whom no question arises) and the lawful issue of any child then dead leaving issue. Two constructions have been contended for; one, that the issue of a child are a class to be ascertained at the death of the child whose death is contemplated; the other, that the class is to be ascertained at the death of the tenant for life. I reject the construction which would include a child dying in the life of the person whose death is contemplated, for the gift seems to be confined to the class of issue left by the child. The court has to determine between the two constructions which I have mentioned, and it is a question of considerable doubt and difficulty.

The general rule of law is not to import a contingency into gifts of this kind; and there can be no doubt that, if the gift had stood alone to the lawful issue of such child as should die in the life of the tenant for life leaving issue, the class would include all the children left by the child who died, and would not be confined to the children only who happened to be in existence at the time of division. That is the general rule. The question is whether, in the words of the will, there can be found enough, not upon a conjectural ground merely, to make the death of the tenant for life the period for ascertaining

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 Warwick v. Hawkins.
 

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the class, and not the death of the *stirps*, concerning whose issue there is this question. I do not think there is enough in this will so to confine the gift. If the words "leaving issue" could be read as referring to issue living at the death of the tenant for life, then, no doubt, that might be the period for ascertaining the class. Having considered the words as carefully as I can, I think that the words "leaving issue" mean the issue at the death of the child in question, and not at the death of the tenant for life, and that, consequently, the time for ascertaining the class is the death of such child. No doubt the testator, with respect to the children of the tenant for life, says that those only are to take who are living at the period of the division of the property. It might very well happen that grandchildren, whose parents were dead, might have had issue in the life of the tenant for life, and making the gift to the grandchildren conditional in the same way would take it away altogether. In that event, without substituting their issue, I cannot see how to import this additional contingency into this gift. The persons then to take are the children left by Philip at the time of his death; Mrs. Miller and Susan Barker take each one third, and the children of Philip take the remaining one third between them.

The next question is, whether the children left by Philip took vested or contingent interests, there being a clear gift to them. I think that this is the ordinary case of a gift with a direction to pay superadded to it, which has not the effect of divesting the gift, although words of contingency are attached to the direction to pay at the age of twenty-one years. A gift to parties to be paid to them at twenty-one is not materially different from a gift to be paid to them if they attain twenty-one, or in case they attain twenty-one. I therefore think that these interests vested in the children of Philip who survived him. I may observe, that it seems hardly possible to distinguish this case from *Masters v. Scales*, but I must say that I consider that the questions upon this will are very doubtful.

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 WARWICK v. HAWKINS.<sup>1</sup>
*Will—Construction—Separate Use.*

A testator, by his will, gave to A, a married woman, an annuity for her life for her separate use, and by a codicil, gave to A, in addition to the legacy mentioned in his will, the sum of 300*l*. No legacy had been given to A by the will:—

*Held*, that A was entitled to the 300*l*. for her separate use.

WILLIAM BAYLEY, by his will, dated the 4th of July, 1846, gave to

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<sup>1</sup> 16 Jur. 902; 21 Law J. Rep. (N. S.) Chanc. 796.

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Plowden v. Hyde.

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Ann Warwick an annuity of 100*l.* a year for her life, for her separate use, free from legacy duty. The testator, by a codicil dated the 5th of November, 1850, directed his executors to pay to Ann Warwick, in addition to the legacy mentioned in his will, the sum of 300*l.*, to be paid to her free of legacy duty.

No legacy had been given by the will to Ann Warwick.

The testator died in November, 1851.

Mrs. Warwick was married, but her husband was out of the jurisdiction.

This was a claim, by Mrs. Warwick, against the executors of the testator, for the purpose of obtaining the legacy of 300*l.*

The only question on the claim was, whether the legacy given by the codicil was given to Mrs. Warwick for her separate use.

*Glasse and Faber*, for the claim, cited *Day v. Croft*, 4 Beav. 561.

*Makins and Daunay*, for the trustees.

PARKER, V. C., said that, on the authority of the case which had been cited, the plaintiff was entitled to the legacy for her separate use.

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PLOWDEN v. HYDE.<sup>1</sup>

July 28, and August 4, 1852.

*Will — Revocation — Conveyance of Equity of Redemption.*

Where real estate is contracted to be purchased, and the purchaser then makes a will devising all his real estate which he had contracted to buy, upon trusts for sale, and subsequently takes a conveyance to the ordinary uses to bar dower:—

*Held*, affirming the decree below, that the conveyance operates as a revocation of the devise of this estate.

Where an estate stood limited to the ordinary uses to bar dower, and the owner mortgaged it in fee, with a proviso for redemption, that on payment the estate should be conveyed to the mortgagee, his heirs, appointees, or assigns, or to such uses as he or they should direct, and he then made his will, devising all his real estate upon trust for sale, and afterwards the mortgagee reconveyed to the mortgagor to the ordinary uses to bar dower:—

*Held*, reversing the decree below, that the re-conveyance was not a revocation of the will as to this estate.

THE facts of this case are fully reported, 21 Law J. Rep. (N. S.) Chanc. 329; s. c. 9 Eng. Rep. 238. The appeal was presented against the dismissal of the petition.

*Willcock and Jessel* appeared for the petitioners, the appellants.

*Makins, Hetherington, and Erskine* were for respondents in the same interest as the appellants.

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<sup>1</sup> 16 Jur. 823; 21 Law J. Rep. (N. S.) Chanc. 196.

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*Russell and Lewin* appeared for the heir at law.

*W. P. Wood, Daniel, Glasse, H. Stevens, and F. Wood*, for other parties.

The following authorities, in addition to those cited below, were referred to and commented on — *Brydges v. The Duchess of Chandos*, 2 Ves. jun. 417; *Williams v. Owens*, Ibid. 595; *Harmond v. Oglander*, 6 Ibid. 222; *Welby v. Welby*, 2 Ves. & B. 187; *Lock v. Foote*, 5 Sim. 618; *Youde v. Jones*, 14 Ibid. 163; *Poole v. Coates*, 2 Dru. & War. 497; *Tennant v. Tennant*, Ll. & G. temp. Plunkett, 516; *Ruscombe v. Hare*, 6 Dow, 1; s. c. 2 Bligh, (N. S.) 192.

August 4. KNIGHT BRUCE, L. J. The question of revocation, the only question argued before us in this case, relates to two distinct portions of the real estate of Mr. Henry Chicheley Plowden, the testator in the cause; one included in the mortgage of the 1st of May, 1811, and a conveyance of the 7th of December, 1813, the other included in neither of those instruments, but comprised in a deed of the 9th of November, 1811. With regard to the latter portion, I am unable to distinguish this from the case of *Rawlins v. Burgis*, 2 Ves. & B. 382, which was decided in 1814, by a careful judge, since followed in more than one instance, and never, so far as I am aware, overruled. I do not think that we ought to refuse to follow it now. Whether, if the point of revocation that it determined were new, I should have held an opinion in conformity with that decision or not, is a question as to which it is unnecessary for me to say anything.

With respect to the other portion, the title stands thus: the hereditaments of which it consists having been acquired by the testator, were, by his desire, conveyed, on the 23d of April, 1811, in this manner, "To such uses as the testator should by deed or will appoint, and in default of, and until such appointment, to the use of the testator for his life, with remainder to the use of Mr. Dyneley, his executors, administrators and assigns, during the testator's life, in trust for the testator, with remainder to the use of the testator, his heirs and assigns for ever." Very soon afterwards, namely, on the 1st of May, 1811, he mortgaged those hereditaments in fee, Mr. Dyneley, as his trustee, joining in the mortgage to the mortgagee, Mr. Newton, whom, in December, 1813, the testator paid off, whereupon, by his direction, Mr. Newton, on the 7th of December, 1813, conveyed the mortgaged hereditaments to the testator and his heirs, "to such uses as the testator should, by deed or will appoint, and in default of, and until appointment, to the use of the testator for his life, with remainder to the use of Dyneley, his executors, administrators and assigns, during the testator's life, in trust for the testator, with remainder to the use of the testator, his heirs and assigns for ever."

The testator's will, devising these hereditaments, having been made on the 15th of May, 1811, the point has arisen whether the effect of the conveyance of the 7th of December, 1813, was, or was not to

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 Flowden v. Hyde.
 

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render the will inoperative as to them; a suggestion, which, however startling to common sense, however foreign to natural equity, is yet rendered plausible, if not sound, by the state of the law of England, as it stood before the testator died in 1821, — a state upon this particular subject which was discreditable to a civilized country. It has since been altered, but not with reference to the property of men who had ceased to live before 1838. Their property is subject to the old law, which, however, was such that, upon the present point, no man, I suppose, would be willing, without absolute necessity, to treat a case as falling within it. Does the necessity exist here? I think not. I am of opinion that the object, the intention of the deed of the 1st of May, 1811, was to make the mortgage in fee, and not otherwise, to affect the title of the mortgaged property; and the conveyance of the 7th of December, 1813, having been to the same uses and for the same purposes as the uses and purposes by which it stood affected immediately upon the making of the mortgage of the 1st of May, 1811, my view of the matter is, that the conveyance of 1813 did not, by freeing the property from the mortgage, affect the title to the lands, or the testator's interest in them, or his power over them, otherwise than so far only as to make that wholly or in part legal which before had been merely equitable. It is true that Mr. Dyneley never was more than a mere trustee for the testator; this, however, seems to me to make no difference; for if it is conceded, as in my opinion it ought to be, that by the deed of mortgage the testator meant to mortgage merely, and nothing more, why should it be supposed that he ever intended the lands to be re-conveyed by the mortgagee simply to the uses of the testator in fee, — he himself having before the mortgage, as well as after the mortgage, caused them to be conveyed for his benefit to the uses usual for preventing dower? From the only report<sup>1</sup> that I have seen of the argument before the able judge in whose court this petition originally was, I collect that neither *Ruscombe v. Hare* nor *Innes v. Jackson*, 16 Ves. 356, before Lord Eldon, nor *Jackson v. Innes*, 1 Bligh, 104, before the house of lords, nor any of that class, were cited.

[*Russell* and *Malins* said they were cited.]

From the only report that I have seen neither of those cases appears to have been cited. This I regret, for I might otherwise not have been placed under the necessity of differing from one whose judgment I estimate at least as highly as my own. He seems to have considered the proviso for redemption without reference to those authorities; that is the effect of the judgment. The judgment does not allude to them, and I am not quite sure that were I to do so myself, (that is, consider the proviso for redemption without reference to that class of cases,) I should not arrive at his conclusion, but neither am I convinced that I should; for, perhaps, if my opinion ought to turn upon the language of the proviso, the expressions used are at least as much in the appellant's favor as against him, the clause being

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<sup>1</sup> By reference to the Law Journal Report, vol. 21 Chanc. p. 381; s. c. 9 Eng. Rep. p. 241, it will be seen that *Innes v. Jackson* was cited.

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Plowden v. Hyda.

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thus worded: "That after the money is paid, the mortgagee will, upon the request and at the costs and charges of the said H. C. Plowden, his heirs, appointees or assigns, re-convey the said capital and other messuages, farms, &c. unto the said H. C. Plowden, his heirs, appointees, or assignees, or to such uses and in such manner as he or they shall direct, free from all incumbrances to be created by the mortgagee."

On the whole, having, since the argument before us, read the authorities then cited, and every other within my knowledge that it could on this dispute be important to refer to, and thinking that, as to the question of revocation, this case stands exactly on the footing on which it would have stood if the testator, having immediately before the mortgage been simply seized in fee, had, upon paying it off, taken from the mortgagee a simple re-conveyance to himself in fee; because, having immediately before the mortgage held the property, subject to the usual limitations for preventing dower, he, upon paying it off, took from the mortgagee a conveyance or re-conveyance having limitations, the same in form and substance and object, as existed when the mortgage was made, I am of opinion that it may, consistently with *Ticknor v. Ticknor*, cited 3 Atk. 742, with *Rawlins v. Burgis*, and with every established rule of law, be held, as I do hold, that this testator's testamentary dispositions are equitably in force with respect to the mortgaged portion of his real estate; and that so far, at least, it is not incumbent upon the court to defeat his wishes, disappoint his intentions, and subvert his will.

LORD CRANWORTH, L. J. I concur in the result at which my learned brother has arrived, and in a great measure upon the same grounds. It might be unnecessary for me to do more than to express my concurrence; but as we differ from the learned Vice-Chancellor, I thought it right, unconnected with my learned brother, to put my view of the case down, so that I may state that also. It is unnecessary for me to go through the facts, because that has been already done.

The question divides itself into two branches; first, as it regards the South Baddesley land; and, secondly, as it regards the property at Boldre, mortgaged to Mr. Newton. With respect to the former, there is no doubt of the soundness of the opinion appealed from, unless we are prepared (which we are not) to act in opposition to the case of *Rawlins v. Burgis*, decided by Sir Thomas Plumer in 1814. The purchase in this case was made at an auction, and, in the absence of evidence, we cannot assume that there was any special stipulation as to the form of conveyance to be made. The purchaser, therefore, became the equitable owner in fee; and *Rawlins v. Burgis* decides that in such circumstances a conveyance to the purchaser to the usual uses to bar dower operates as a revocation of the previous devise of the equitable fee. As to the lands at South Baddesley, therefore, the present case cannot be distinguished from, and must be governed by, that authority. Indeed, as to those lands, the petitioner can hardly be said to have seriously questioned the correctness of the Vice Chancellor's decision.

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Plowden v. Hyde.

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The main contention before us was, as to the messuages and lands at Bolde, mortgaged to Newton. The Vice-Chancellor decided that the devise of this property was revoked by the re-conveyance in December, 1813, and my impression during the argument was in favor of that decision, but subsequent consideration of the doctrine applicable to such cases has led me to a different conclusion. Sir Richard Kindersley reasoned thus:— If a person seized in fee made a mortgage in fee in the ordinary way, reserving the right of redemption to himself and his heirs, and then, before the 7 Will. 4 & 1 Vict. c. 26, had come into operation, devised his equity of redemption, a subsequent re-conveyance to him and his heirs, by the mortgagee, upon the mortgage debt being paid off, did not affect the previous devise of the equity; but if the re-conveyance was made, not to the mortgagee in fee, but to him, to the usual uses to bar dower, this effected a revocation, for the same reasons as are applicable to the case of a purchaser. The conveyance in such a case was not merely a uniting of the legal with the equitable estate; it effected and created new rights and incidents in the property, and so operated as a revocation of the devise. Assuming that to be clear in the case of a simple mortgage in fee, with the right of redemption reserved to the mortgagor and his heirs, the Vice-Chancellor then proceeded to consider how far that general principle was affected by the special terms in which in this case the redemption was reserved. The reconveyance is to be “unto the said H. C. Plowden, his heirs, appointees or assigns, or to such other person or persons, to such uses, and in such manner as he or they shall direct.” Even taking these words to indicate the form of re-conveyance, which was the most favorable interpretation for the appellant, still, though such a proviso would have warranted a re-conveyance to such uses as the mortgagor should appoint, and in default of appointment to him and his heirs; and though a re-conveyance so made would not, upon this construction of the proviso, have effected a revocation, yet the language used did not, in the judgment of the Vice-Chancellor, warrant a re-conveyance in the form actually adopted; namely, to such uses as the said H. C. Plowden should by deed or will appoint; and in default of appointment, to the use of the said H. C. Plowden for life, with remainder to the use of the said J. Dyneley, for the life of and in trust for the said H. C. Plowden, with an ultimate limitation to the use of the said H. C. Plowden, his heirs and assigns. His honor was of opinion that these uses differed materially from those warranted by the proviso for redemption; and so that the re-conveyance not having been made in the stipulated mode, operated as a revocation of the previous devise.

Of the correctness of this reasoning, so far as relates to the first branch of it, there cannot, I think, be any doubt. Taking the case of *Rawlins v. Burgis* to be a binding authority, I can discover no distinction in principle between the case of a person entitled in fee to the equity of redemption in lands mortgaged in fee, and that of a person equitably entitled to lands under a contract to purchase them. If a conveyance to the ordinary uses to bar dower caused, before the



statute of 1837, a revocation of the will in the latter case, it must have had the same effect in the former. Such a construction is in conformity with what would have happened if the devisee had been the owner of the legal instead of the equitable fee. If a person seized in fee made his will before the statute, and thereby devised his inheritance, and afterwards conveyed his legal estate so as to take it back to himself, not in fee simple absolutely, but to the usual uses to bar dower, this unquestionably was a revocation of the devise, and on this analogy the decision in *Rawlins v. Burgis* was founded; applying to the devise of the equitable fee, the doctrine applicable to a will affecting the legal estate. As I have already stated, I see no reason for thinking that a different rule should be applied to the devise of an equity of redemption, from that governing the case of a person entitled to the fee simple by contract as a purchaser. So far, therefore, I concur in the view taken of the law by the Vice-Chancellor.

But as to the second branch of this reasoning, I think there is, at all events, very considerable doubt. I am not prepared to assent to the proposition that, if an equity of redemption in a mortgage in fee had, before the act, been reserved to such uses as the mortgagor should appoint, and in default of appointment to the use of the mortgagor and his heirs, that a re-conveyance to the usual use to bar dower, would have operated as a revocation of a devise made before the re-conveyance. When the legal owner in fee, after devising his estate, conveyed it by feoffment, or by lease and release, to such uses as he should appoint, and in default of appointment to the use of himself, for life, with remainder to a trustee during his life, and with the ultimate use to himself in fee, there was a change of the seizin; but if the owner of an estate had an absolute power of appointment as well as the legal fee, that is to say, if his estate stood limited to such uses as he should appoint, and in default of appointment, to the use of himself in fee, the consequence might be different. In such a case, if the owner, after making his will and devising, had made an appointment so as to take an estate with the ordinary uses and limitations to bar dower, I know of no authority deciding that this would be a revocation of the will; there would in such a case be no change of seizin, and so the principles applicable to a devise by a person having a mere estate in fee simple do not necessarily apply. And if this would not have been a revocation at law, it would seem to follow that it would not have been a revocation in equity, when the subject matter of the devise was an equity of redemption. Upon this point, however, it is not necessary for me to say that I differ from Sir Richard Kindersley; for, even assuming his view of the law to be correct on this second point, as well as the first, still I think that here there was no revocation. The principle upon which I conceive this case must rest is, that by the deeds of the 6th and 7th of December, 1813, the estate was reconveyed to precisely the same uses to which it had stood limited previously to the mortgage. It is a well established principle that in the absence of express stipulation to the contrary, a mortgage is to be considered in this court as a mere

charge, taking out of the property so much as is necessary for accomplishing the object, and leaving all not so abstracted precisely as it stood before the mortgage. The equity of redemption, therefore, attaches on the estate of the mortgagor, with all the same rights, restrictions, and qualifications to which his legal estate had been previously subject; when, therefore, the mortgagor pays off the mortgage, and takes a conveyance of the property to the same uses to which it had stood limited previously to the mortgage, he is, in fact, only doing that which has been described as bringing home the legal estate, or as clothing the equitable with the legal estate; and all the authorities show that there would be no revocation of a devise of the equitable interest made while the legal interest was outstanding. That is precisely what was done here. The estate, previously to the mortgage, stood limited to such uses as the said H. C. Plowden should by deed or will appoint; and in default of appointment, to the use of him for life, with remainder to the use of J. Dyneley, his executors and administrators, during the life of, and in trust for, the said H. C. Plowden and his assigns, and after the expiration of these estates to the use of the said H. C. Plowden and his heirs; when the mortgage was paid off in 1813, the property was reconveyed to the same uses, bringing the case within the rule to which I have referred. Of course, however, if the mortgagor had expressly stipulated that the right of redemption should be reserved in a manner not according to the previous state of the property mortgaged, the general rule would then give way to such express stipulation; and the only remaining question, therefore, here is, whether there is any such express stipulation to be found on the face of the mortgage. I am clearly of opinion that there is not. I have already adverted to the language of the proviso for redemption. Sir Richard Kindersley reasoned on the assumption that it was intended to point out a peculiar mode of reconveyance. He did so, because he considered that was the view the most favorable for the party against whom he was deciding; and not because it was the correct construction of the proviso. This, I think, may be fairly inferred from the whole tenor of his observations in this case, in which I concur. There is a profusion of words in the proviso in question; in truth, it is no more than a proviso for repayment of the mortgage money to the mortgagee, and a reconveyance to Mr. Plowden, his heirs or assigns. The word "appointees" can hardly be said to have any meaning beyond the word "assigns," and like those which follow, "such person or persons," are, in fact, tautology. It must, therefore, be treated merely as a reconveyance to the mortgagor and his heirs, and it does not show any intention affecting the nature of the estate out of which the mortgage was granted. I am very glad, therefore, consistently with what I consider the principles applicable to this case, to be enabled to support and give effect to the will of this testator.

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*Ex parte Wryghte; In re The Great Western Extension Atmospheric R. Co.*

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*Ex Parte WRYGHTE; In re THE GREAT WESTERN EXTENSION  
ATMOSPHERIC RAILWAY COMPANY.*<sup>1</sup>

July 20, 1852.

*Company — Winding-up Acts — Liability of individual Contributors  
— Jurisdiction of Master.*

Directors of one railway company passed a resolution to lend money to the directors of another company on their personal responsibility, and the money was so lent, and some of the directors signed a guarantee for repayment. Under an order for winding up the company, the directors of which borrowed the money, a claim was carried in on behalf of the lending company, but it was disallowed; and on appeal, it was held, — affirming the decision of the Master, — that where a company or association is ordered to be wound up, the Master has no jurisdiction under the order to take cognizance of a claim not alleged to be due from the company, but only from individual members of it, and that it made no difference that the money was applied for the purposes of the company.

This was an appeal, presented to Vice-Chancellor Parker, against a decision of the Master, charged with the winding up the affairs of the Great Western Extension Atmospheric Railway Company, refusing to admit a claim brought in by Mr. Wryghte, the official manager of the Tring, Reading, and Basingstoke Railway Company. The question arose thus: On the 23d of October, 1845, at a meeting of the directors of the Tring Company, a resolution was passed that 2,000*l.* should be lent and advanced to the directors of the Atmospheric Company, upon their personal responsibility, for a time not exceeding three months, at the rate of 5*l.* per cent. per annum; and the solicitor of the company was authorized to carry into effect an arrangement for completing the loan. On the following day, 2,000*l.* was advanced out of the assets of the Tring Company; and the following memorandum, signed by twelve of the twenty-one directors of the Atmospheric Company, was delivered to G. P. Hill, Esq., the solicitor of the Tring Company, by way of security.

“Great Western Extension Atmospheric Railway Company, October 27, 1845.

“To G. P. Hill, Esq. In consideration of your lending and advancing to us, the undersigned, the sum of 2,000*l.*, we hereby, jointly and severally, guarantee to you the re-payment of the same, with interest at 5*l.* per cent. per annum, within three months from the date hereof.”

On the 28th of November, 1845, the directors of the Tring Company passed the following resolution: “Resolved, that the sum of 500*l.* be lent to the Great Western Extension Atmospheric Railway Company, on the guaranty given to Mr. Hill, on behalf of the company, the solicitor undertaking to produce the 500*l.*, whenever wanted for the purposes of this company, at a week’s notice.” On the same day, 500*l.*, part of the assets of the Tring Company, was lent to the Atmospheric Company; and the following memorandum, signed by ten out of the twenty-one directors of the Atmospheric

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<sup>1</sup> 16 Jur. 715; 21 Law J. Rep. (N. S.) Chanc. 807.

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*Ex parte Wryghte; In re The Great Western Extension Atmospheric R. Co.*

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Company, was delivered to Mr. Hill, as solicitor of the Tring Company, by way of security.

"Great Western Extension Atmospheric Railway Company.

"To Mr. G. P. Hill. In consideration of your advancing and lending to us 500*l.*, we hereby jointly and severally promise and undertake to re-pay to you that sum, with 5*l.* per cent. interest, on the 1st day of February next. Dated the 28th of November, 1845."

The 2,500*l.* thus lent was applied, as one side asserted, and as to the much greater part, as the other side admitted, to the purposes of the Atmospheric Company.

On the 27th of July, 1849, the Atmospheric Company was ordered to be wound up; and on the 23d of November following, an official manager was appointed, and the Tring Company, having also been ordered to be wound up, Mr. Wryghte, who was chosen official manager, brought into the Master's office an affidavit to prove a debt of 2,500*l.* against the Atmospheric Company, being the sum so advanced under the before-mentioned guaranties, the whole of which then remained due and owing to the Tring Company.

After two appointments for hearing, the claim was, on the 6th of February, 1852, disallowed "for want of evidence, and as being barred by the Statute of Limitations." An appeal was presented, and Vice-Chancellor Parker sent the case back to the Master, on the question of the Statute of Limitations, to review his decision. On the 6th of June, the case was argued before the Master; and *Lloyd's case*, 1 Sim. (N. S.) 248; s. c. 3 Eng. Rep. 279, being cited, leave was given to Mr. Wryghte to carry in an amended claim, giving due notice to the parties intended to be charged. On the 17th of the same month he carried in the following: "The said W. C. Wryghte, as such official manager as aforesaid, claims of the following parties, as contributories in the above-mentioned Great Western Extension Atmospheric Railway Company, that is to say, (the nine persons who signed the first guaranty,) being the persons who signed the guaranty of the 27th of October, 1845, and who have been settled on the list of contributories of the said company as contributories thereof, the sum of 2,000*l.*, with interest thereon from the 27th of October, 1845, until payment, for money lent and advanced on the said 27th of October, 1845, by the directors of the Tring, Reading, and Basingstoke Railway Company, to and for the use of the Great Western Extension Atmospheric Railway Company, of which company the said several persons were then directors." The claim then went on in like manner concerning the 500*l.*, and the directors who signed the guaranty of the 28th of November, 1845. Notice having been duly served on all parties proper to be served, the matter came on before the Master, and he disallowed the claim, on the ground that the Winding-up-Acts did not give him any jurisdiction in respect of claims against individuals; whereupon the present appeal was presented, and was set down for hearing before Vice-Chancellor Parker.

*Daniel and Roxburgh*, for the appellant. This claim was originally

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*Ex parte Wryghte; In re The Great Western Extension Atmospheric R. Co.*

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made against the company; but, subsequently, it was carried in against the members of the body of directors of the Atmospheric Company, who signed the guaranty; and it was so, on the authority of *Lloyd's case*, decided by one of your lordships, when a Vice-Chancellor, where it is understood to have been laid down that though a claim cannot be proved against a company, it may be proved against the individuals who have made themselves liable. Here some of the directors have so done by signing the guaranties; and who, with the other nine directors, form the body of contributories on the list, as liable for the debts of the company. The same principle seems to be admitted in *Carrick's case*, 1 Sim. (N. S.) 505; s. c. 5 Eng. Rep. 114. Nothing could be more just than that the parties who signed these guaranties should be made liable, and nothing could be more inequitable than to hold that they are not liable in proceedings under the Winding-up Acts, merely on the supposed ground of want of jurisdiction, since it is not disputed that the money was applied and expended in the affairs of the company directed under the order to be wound up. Although strictly it is money due from a certain number of individuals who were directors of the Atmospheric Company, still it was in justice one which should be provided for under the winding-up proceedings against that company.

[KNIGHT BRUCE, L. J. It seems admitted that this cannot bind the company. Is there any authority for saying that such a proceeding is within the scope of these acts of parliament? How is it possible to say a man can be admitted as a creditor whose claim is not against the whole company? A claim against a company, for a debt incurred by its agent, with its authority, is a very different thing, and such a claim we should readily attend to.]

It is admitted that the demand is against the directors who signed the guaranty, and not against the association as a body; but still it is no more than just and equitable that, the money having been expended for the whole body of the company, the claim should be admitted under the Winding-up Acts.

[LORD CRANWORTH, L. J. All that I decided in *Lloyd's case* and *Carrick's case* was this, that where an attempt is made to prove against the whole body of contributories a debt which has been contracted by some of them, it is necessary, before the debt can be admitted, to show that it was authorized to be contracted, either expressly or impliedly, by the whole body. I have never decided that, under a winding-up order, a debt or claim can be proved against one out of a body of contributories, unless the debt has been authorized, so as to bind the whole.]

Certainly the interpretation which has been mentioned in argument must have been impressed on the mind of the Master, when he, upon *Lloyd's case* being cited to him, consented to permit Mr. Wryghte to take in the amended claim.

KNIGHT BRUCE, L. J. The company or association in this case directed to be wound up, is the Great Western Extension Atmospheric Railway Company. It seems, the other company now claim,

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*Ex parte Wryghte; In re The Great Western Extension Atmospheric R. Co.*

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or at one time supposed themselves, to be creditors of the company to be wound up. That may or not have been so; or, being so, the question is not before us. The question raised before us is, whether, under the order directing the winding up of the company, which I have mentioned, the Master could take cognizance of a demand not alleged to be due from the company, but from some, and only some, of the persons members of it. My opinion is, that the Master has no jurisdiction to enter into such a question. It has been said to be convenient and just that it should be so, inasmuch as in this particular instance the money was applied for the purposes of the company. That circumstance can make no difference in the principle, or in the rights of the persons cognizant of the transaction; and concerning a debt of the company, the purpose for which it is applied is absolutely immaterial. If such a demand is to be admitted, the private debts of every individual contributory might be brought in under the order.

LORD CRANWORTH, L. J. I regret if anything which I may have said extra-judicially in *Lloyd's case* should have led to the construction which has been put upon it. In that case, if I remember rightly, the Master declined to admit a claim as a debt unless it were shown that the company, or some of the contributories, were liable to it; but he admitted it was a claim. An application was made to me, when Vice-Chancellor, to reverse what had been done by the Master, and to adopt the claim as a debt. I refused, and at the same time expressed a doubt whether the Master had not gone too far in admitting it as a claim. I thought that, before admitting either a claim or a debt, it was necessary to show not only that there was a creditor, but also that there was a debtor; and, what is perhaps more material, to go on and show that the debtor was a debtor whose debts were to be wound up under the order. The language attributed to me by the report of the case seems to have led to the inference that I also meant to say that the Master might admit a claim against individuals forming part only of the company, if they alone were the parties liable. If the language of the report bears that construction, it is to be regretted that what was meant has been couched in language so inaccurate. All I intended to decide or say was, that the claim should not be admitted as a proof, and that I doubted whether it ought to be admitted as a claim until it had been shown that the parties sought to be charged were the parties liable to the demand. The order now to be made will be, that the appeal motion be dismissed, with costs, but without prejudice to any application which may be made to the Master to prove the debt against the company or association directed to be wound up.

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*In re Hart.*


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*In re HART.*<sup>1</sup>

June 4, 1852.

*Lunacy—Taxation of Solicitor's Bill.*

Solicitors who claimed costs for taking out the commission, and for other business in the lunacy, obtained an order for taxation but did not tax. Five years after the order the lunatic died, leaving real estate, but no personal property. The solicitors sued the committees at law, but they set up the Statute of Limitations, and the action failed. The solicitors now presented a petition, praying an order for taxation, with a view to proceedings to make the real estate liable, and the court made the order, but without prejudice to any question whether the petitioners had any claim on the lunatic's estate.

THIS was a petition presented in the lunacy by a firm of solicitors, praying an order for the taxation of their bill of costs.

*Prendergast*, in support of the petition, stated that he would admit in the outset, that the petition was presented with the view to some proceedings by bill or claim, or otherwise to enforce the demand of the petitioners against the real estate of the lunatic, he having died without leaving any personalty. The petitioners meant to endeavor in such way as they might be advised, to establish their claim as a charge on the real estate. The circumstances under which the petition was presented were of a peculiar nature. Before the lunacy, these solicitors were employed by the persons who were afterwards appointed committees to take out and prosecute the commission, and after their appointment the solicitors were still employed by the committees in the matter of the lunacy, and it was in this business before and in the lunacy that the costs now claimed were incurred. In 1842 the petitioners obtained an order to tax their bill of costs, but no taxation actually took place during the life of the lunatic, who did not die until 1847. After that event, the petitioners required payment from the committees, but they declined to accede to the demand on the ground that the lunatic left no personal estate to meet it, whereupon the petitioners brought an action against the committees personally, as the persons who had employed them in the business; but a plea of the Statute of Limitations was put in, and the plaintiffs failed. In this state of circumstances the petitioners submitted to the court that, as the costs had been incurred for the benefit and protection of the lunatic, and as he left real estate, that estate ought to be rendered in some manner liable to the payment of so just a demand. In *Williams v. Wentworth*, 5 Beav. 325, a bill was filed by a party who had petitioned for a commission of lunacy, under which the lunacy was established, and on traverse was confirmed, and an order was made for the taxation of costs, but before taxation the lunatic died. Subsequently, a new order for taxation was made, and the costs were taxed at a stated sum, and an order was made declaring that the costs had been properly incurred for the benefit of the luna-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 810.

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*In re Hart.*

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tic; the bill was filed by this person, on behalf of himself and all other the creditors of the lunatic, in order to obtain payment out of the real and personal estate. A demurrer to the bill was overruled, the Master of the Rolls deciding that where moneys are expended for the necessary protection of the person and estate of a lunatic, the law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate; and it was there further held, that the costs were to be raised out of the real estate if the personal estate should be deficient. The reasons given by his lordship in his judgment in that case applied equally here. In the case of *Taylor v. Taylor*, 3 Mac. & G. 426, the same principle was recognized, although the Lord-Chancellor there did not deal with the costs as being in the nature of a lien, but because, there being a cause, and the fund being in that cause, it could not be dealt with or got at without the aid of the court, and he declared that he saw no reason for not making the order, "the costs being in equity a charge on the estate."

*Grenside*, for the committees, the respondents, argued that, as there was already an order for taxation, there was no necessity for the petition. On that ground, therefore, it ought to be dismissed. The court would not lend facilities to the harassing the committees, who, in the exercise of their duty having pleaded, and successfully, the Statute of Limitations to the action, would be equally certain to succeed in a similar plea to any bill or other proceeding in this court. Whatever object might be in view, and however that object might hereafter be sought to be effected, it was, in truth, an endeavor to do indirectly what could not succeed directly. If the court were to make any order on the petition, the petitioners would deal with it as a sort of recognition of their right against the real estate of the deceased lunatic.

KNIGHT BRUCE, L. J. If this be an honest demand, and no part of the argument goes the length of impeaching its honesty, it is as hard a case upon the petitioners as I ever heard of. If the action failed by reason of the Statute of Limitations, so any suit here must share the same fate; and although the court is certainly in favor, if it has a prejudice, of common honesty, it has no jurisdiction to make any declaration of charge, but it can direct the taxation of costs, and order the remainder of the petition to stand over, reserving the consideration of all questions of costs of this matter.

LORD CRANWORTH, L. J., intimated his concurrence.

The order ultimately made was to direct the taxation of the costs, and that the Master should distinguish those incurred before from those incurred after the death of the lunatic, and that the remainder of the petition should stand over. And, at the suggestion of the counsel for the respondents, the order was to be without prejudice to any question whether the petitioners had any claim against the assets of the lunatic. The Master was also directed to be at liberty to state any special circumstances which might arise on the taxation.



Blann v. Bell

BLANN v. BELL.<sup>1</sup>

June 9, 25, and 28, 1852.

*Will — Construction — Gift of Dividends — Life Interest — Enjoyment in Specie — Charge of Debts.*

A testator gave the residue of his estate to trustees upon trust to pay the dividends of 1,500*l.* consols to A, for life, and, after his death, to divide the dividends of the said sum equally between his wife, E. B., and his niece, F. R., and the survivor of them. The testator gave all the residue of his estate to his wife, E. B., for life, with remainder to his niece, F. R., for life, with remainders over. F. R. died:—

*Held*, that E. B. was entitled only to a life estate in the 1,500*l.* consols, and was not entitled to the principal.

A testator gave all the residue of his real and personal estate to trustees upon trust to pay certain specified legacies, and then, as to all the rest, residue, and remainder of his freehold, copyhold and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interests, rents, profits and annual produce to his wife for her life. The testator at his death was possessed of leaseholds, shares in companies and Dutch bonds.

*Held*, that the widow was entitled to the enjoyment of the leaseholds in specie, but not of the shares or Dutch bonds.

A testator directed his debts to be paid, and then gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of all the rest, residue and remainder of his freehold, copyhold, and leasehold estates, and all other his estate and effects:—

*Held*, that the personal estate was the primary fund for the payment of the debts and legacies; and that the real estate was only charged with them as a subsidiary fund.

THOMAS BLANN, by his will dated the 15th of December, 1842, directed all his debts and funeral and testamentary expenses to be paid and satisfied; and then appointed certain persons to be his executors; and then gave the specific and pecuniary legacies therein mentioned. The will then proceeded as follows:—“And as to all the residue of my estate and effects whatsoever and wheresoever, whether consisting of freehold, leasehold, or copyhold estates, money in the public stocks or funds, and all other moneys or securities for money, I give, devise and bequeath the same to my said wife Edith Blann, and the said J. T. Bell, W. Manses, and J. R. Bell, their heirs, executors, or administrators, and I direct them to stand and be possessed thereof, upon the trusts following, that is to say, upon trust to pay the dividends of 1,500*l.*, 3*l.* per cent. reduced bank annuities, to Mrs. Sarah Twichin of, &c., for her life; and, at her decease, I direct the dividends arising from the said sum of 1,500*l.*, 3*l.* per cent. reduced bank annuities, to be equally divided between my said wife Edith Blann, and my niece Frances Rayner, and the survivor of them.”—[The will then contained gifts of three other sums of stock for three other persons for their lives, with a direction that at the decease of each annuitant the dividends should be equally divided between his said wife

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 811; 16 Jur. 1081.

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Blann v. Boll.

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Edith Blann and his said niece Frances Rayner, and the survivor of them.] "And upon trust to pay to Frances Rayner, my niece, the dividends of 8,000*l.*, 3*l.* per cent. consolidated bank annuities for her life, and, upon trust, in case of the death of the said Frances Rayner, leaving issue," &c. [Here followed a trust for the issue of his niece.] "And, as to all the rest, residue, and remainder of my freehold, copyhold, and leasehold estates, and all other my estate and effects, subject to such power of appointment as is hereby vested in my said wife, upon trust to pay the dividends, interests, rents, profits, and annual produce thereof to my said wife Edith Blann, or otherwise permit and suffer her to receive, take and enjoy the same for and during the term of her natural life."

The will then proceeded to direct that, after the death of his wife, 1,000*l.* should be made subject to her appointment by will, and that the income of the residue should be paid to his niece Frances Rayner for life, and that the capital should be divided among her children, as therein mentioned, and, in default of children, should go to certain charities.

The testator died in 1846. Part of his personal estate at his death consisted of canal shares, Dutch bonds, shares in assurance companies, and leasehold property. Mrs. Twitchin the annuitant died, and Frances Rayner the testator's niece also died.

The bill was filed by Mrs. Blann for the administration of the estate of the testator.

Three questions were raised in the suit: first, whether, by the gift to Mrs. Blann of the dividends of the 1,500*l.* stock, she was entitled to the stock itself; secondly, whether Mrs. Blann, as tenant for life of the residue, was entitled in specie to the enjoyment of the leaseholds, Dutch bonds and shares; and thirdly, whether the real estate of the testator was to contribute *pari passu* with the personal estate to the payment of the debts and legacies.

*Malins and Collins*, for the plaintiff.

*Bacon, Little, Walker, Giffard, Willcock, Smith, J. Russell, and Younge*, for other parties.

The following cases were cited:—

On the question whether the gift of the dividends amounted to a gift of the stock, *Innes v. Mitchell*, 6 Ves. 464; *Adamson v. Armitage*, 19 Ves. 416; *Soames v. Martin*, 10 Sim. 287; s. c. 8 Law J. Rep. (n. s.) Chanc. 367; *Cooke v. Bowler*, 2 Keen, 54; s. c. 5 Law J. Rep. (n. s.) Chanc. 250; *Kilvington v. Gray*, 2 Sim. & S. 396.

On the question whether the plaintiff was entitled to the income of the leaseholds, the canal and assurance shares, and the Dutch bonds. The cases cited in 2 *Roper on Legacies*, 1344; *Mills v. Mills*, 7 Sim. 501; s. c. 4 Law J. Rep. (n. s.) Chanc. 266; *Benn v. Dixon*, 10 Sim. 636; s. c. 9 Law J. Rep. (n. s.) Chanc. 259; *Sutherland v. Cooke*, 1 Coll. 498; s. c. 14 Law J. Rep. (n. s.) Chanc. 71; *Hunt v.*

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 Blann v. Bell.
 

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*Scott*, 1 De Gex & S. 219; *Burton v. Mount*, 2 Ibid. 383; *Chambers v. Chambers*, 15 Sim. 183; s. c. 15 Law J. Rep. (N. S.) Chanc. 318.

On the question of the real estate contributing *pari passu* with the personal estate, *Cole v. Turner*, 4 Russ. 376; s. c. 6 Law J. Rep. Chanc. 101; *Roberts v. Walker*, 1 Russ. & M. 752; *Ball v. Harris*, 4 Myl. & Cr. 264; s. c. 8 Law J. Rep. (N. S.) Chanc. 114; and *Young v. Hassard*, 1 J. & Lat. 466.

PARKER, V. C. The first question here is as to the annuities; one of which has fallen in by the death of Sarah Twitchin, the annuitant. The testator gives all his real and personal property to trustees on the trusts following: to pay the dividends of 1,500*l.*, 3*l.* per cent. reduced bank annuities, to Sarah Twitchin for life; and, at her death, he directs the dividends of that sum to be equally divided between his wife Edith Blann, and his niece Frances Rayner, or the survivor of them. There are several other gifts in the same words. The question is, whether he gave Edith Blann, who is the survivor, an absolute interest or an interest only for her life. No doubt the general rule is, that an unqualified gift of the income of a fund confers an absolute, and not merely a life, interest in the principal; but it is always a question of construction on a will to discover whether the testator did or not intend to give more than a life interest. Upon this point several authorities have been cited. It is not a very strong rule which gives an absolute interest in such cases. The court is obliged to find out the intention of the testator from the words in which he has expressed it. Here the words are, "I direct the dividends arising from the said sum of 1,500*l.*, 3*l.* per cent. reduced bank annuities, to be equally divided between my said wife Edith Blann and my niece Frances Rayner, and the survivor of them." The dividends are, under this direction, to be from time to time divided between these two persons, and the survivor of them. That means that the two were to take together, and that the survivor, after the death of either, was to have the whole. It appears to me that the enjoyment of these dividends in succession was to be to the two for life, and then to the survivor for an interest, which must be the same. To this it is to be added, that the general scheme of the will is to give life interests to these same parties. I think that there can be little doubt that a life interest only in this annuity is taken by the survivor. There must be a declaration that the plaintiff is entitled for her life only to the dividends of 1,500*l.*, 3*l.* per cent. reduced bank annuities which have been set at liberty by the death of Sarah Twitchin.

The next question is, what should be the course of administration of the real and personal estate in this case. First, as to the real estate. It has been contended that the testator has shown an intention that the real and personal estate should be liable *pari passu* to the pecuniary charges in the will. I do not think that there is any ground for that argument. The testator begins by directing his debts to be paid. He then gives specific and pecuniary legacies, and then gives all his estate (enumerating it) to trustees, upon trust to pay the dividends of

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Blann v. Bell.

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certain portions, (which are general and not specific bequests); and then as to the rest, residue, and remainder "of my freehold, copyhold, and leasehold estates, and all other my estate and effects," subject to such power of appointment as therein mentioned, he gives the same upon certain trusts, which he proceeds to point out. It appears to me that the ordinary rule as to the administration of real and personal estate must apply here. The personal estate is the primary fund for the payment of debts and legacies, and the real estate is charged as a subsidiary fund, which must mean with what remains due after the application of the personal property in a due course of administration. *Roberts v. Walker* was referred to on this point. It was the first authority of the kind, and perhaps it is not altogether to be reconciled with other cases. The will there contained a direction to sell the real estate. Here there is no direction to sell, but the testator seems to assume that, after his estate is administered to the point of paying his debts and legacies, the real estate will be remaining. Then *Young v. Hassard* was cited. That case appears not to be applicable to this subject at all. The property in this case appears to me to be subject to the ordinary rule of administration. The additional authority of *Boughton v. James*, 1 Coll. 26, seems to me to relieve the question from all doubt. The real estate is not to be applied until the personal estate is found to be deficient.

The next question is, what should be the course of administration of the personal estate. Upon this, two points arise for consideration. The first is, as to the interest of the tenant for life in the leaseholds, which are a wearing-out property; and the second, as to that part of the personal estate, which, though not a wearing-out fund, is not invested upon such security as this court would approve, and yet many yield to the tenant for life a larger income than the ordinary investment would produce. Whether the tenant for life is to have more than this is settled to be a question of intention to be ascertained from the whole will. The general rule is, that an even hand is to be held between the tenant for life and those in remainder. Everything should be turned into a general fund, and the whole should be preserved for those entitled in remainder. The result of the authorities is, that the applicability of the rule in a particular case is to be ascertained by construing the whole will according to the directions given by the testator. No direction is to be found in this will that all the property is to be converted. It appears to me that with respect to the leaseholds, this court must consider that there is no doubt. The testator assumed that there would be freeholds, copyholds, and leaseholds, not required for the purposes of administration, and he directed the payment of "the dividends, interests, rents, profits, and annual produce thereof," to be made to his wife. I do not see how the testator could, in clearer terms, have said that his wife was to have a life interest in the leasehold property, and that it was not to be converted. It is a different question as to the insurance and canal shares and Dutch funds. No direction is given that property of that kind should remain in specie. I think that they must be made subject to the general rule and converted, and that the produce must be invested

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 Waite v. Combes.
 

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in the funds of which the court approves for that purpose. I do not know whether the question of contribution of the leaseholds to the payment of debts and legacies arises, but it may be reserved.

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 WAITE v. COMBES.<sup>1</sup>

June 29, and July 2, 1852.

*Will—Construction—Moneys.*

A testator, by his will, appointed A, and B, to be his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his death, to be by them placed in the funds or otherwise laid out on security, the interest thereof to be paid to his wife for her life, and directed them, after her death, to divide the moneys held in trust by them between his two nieces. The testator had at his death only a small balance at his bankers, and the sum of 1,200*l.* consols:—

*Held*, that the consols were disposed of by the will under the terms of moneys.

THOMAS STANING made his will dated the 19th of August, 1844, which was in part as follows:—“I, Thomas Staning, of &c., being at this time of sound mind and good understanding, and desirous of making a settlement of my affairs, do accordingly declare the contents of this paper to be those of my last will, putting aside and totally doing away with any previous will or wills made by me, and therefore appoint William Combes, of &c., and George Clode, of &c., my executors, to take and receive all moneys that may be in my possession or due to me at the time of my decease, and to prosecute for the recovery of the same if it be found necessary, to be by them placed in the British funds, or otherwise laid out upon such security as they shall deem sufficient, the interest arising from which to be received and paid by them yearly, or oftener, as appears best, unto my dear wife, Caroline Staning, at this time living with me, for her sole use and benefit, but that only during her life, she having but a life interest in it, and, at her death, or as soon afterwards as it can be done, it is my wish, for very sufficient reasons, and I, therefore, authorize my executors to divide equally, between my two nieces, daughters of my sister, Mrs. Ann Combes, of Dorking, or to their children, or the child or children of either, supposing one of them not to have any family surviving, all such moneys held in trust by them, and which my nieces or their surviving children at the death of my dear wife Caroline Staning may become by virtue of this my will entitled to in accordance with the wish already expressed by me.”

The testator died in May, 1846. At the time of the death of the testator his personal estate consisted only of some furniture of small value, a small balance at his bankers, and 1,200*l.* 3 per cent. consols.

This was a claim filed by the nieces of the testator against his exe-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 814.

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\* *Waite v. Combes.*

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cutors. The only question in the case was, whether the 1,200*l.* stock passed by the gift of "all the testator's moneys in his possession or due to him at his decease."

*E. Webster*, for the plaintiffs, cited *Dicks v. Lambert*, 4 Ves. 725; *Legge v. Asgill*, Turn. & R. 265, n.; *Kendall v. Kendall*, 4 Russ. 360; s. c. 6 Law J. Rep. Chanc. 111; *Glendening v. Glendening*, 9 Beav. 324.

*Drewry and Cadman Jones*, for the next of kin, cited *Ommanney v. Butcher*, Turn. & R. 260; *Hastings v. Hane*, 6 Sim. 67; *Gosden v. Dotterill*, 1 Myl. & K. 56; s. c. 2 Law J. Rep. (n. s.) Chanc. 15; *Rogers v. Thomas*, 2 Keen, 8; *Dowson v. Gaskoin*, 2 Keen, 14; s. c. 6 Law J. Rep. (n. s.) Chanc. 295.

PARKER, V. C. This is a claim in which a question of construction arises upon an exceedingly informal will. It appears that the testator, at the time of his death, had a sum of 1,200*l.* consols standing in his name, a very small sum of money at his bankers, and some furniture of the value of 80*l.*, and that this was the whole of his estate. The question is, whether the consols are or are not disposed of. Upon reading the will, I think that the court ought to come to the conclusion that the will disposes of the whole. It is obvious that such was the intention of the testator, although the words used point rather to specific portions of the estate than to the whole. The testator commences his will thus:—"I, Thomas Staning, being at this time of sound mind and good understanding, and desirous of making a settlement of my affairs, do accordingly declare the contents of this paper to be those of my last will, and, therefore"—he then appoints Combes and Clode his executors. This is the language of a man who is about to make a complete disposition of the whole of his property, and not of a man who is about to die intestate as to a considerable part of it. There are no words of gift to the executors in this will. After having commenced as I have pointed out, the testator seems to assume that the executors by their appointment alone, would have the control of his property. He goes on to say—"I appoint these persons my executors to take and receive all moneys that may be in my possession or due to me at the time of my decease, and to prosecute for the recovery of the same, if it be found necessary, to be by them placed in the British funds, or otherwise laid out upon such security as they shall deem sufficient, the interest arising from which to be received and paid by them yearly," and so on, disposing of it. Cases were referred to in the argument on this point, and I add to them the case of *Boys v. Morgan*, 3 Myl. & Cr. 661, an authority to show how unwilling the court is to consider any portion of the personal estate undisposed of. The whole will in this case seems to point to a complete disposition; but, if it were not so, I think that the words used are sufficient to pass the consols in question. The executors are "to take and receive all moneys that may be in his possession or due to him at the time of his decease, and to prosecute for the

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*Ex parte* The East of England Banking Co.; *In re* The Norwich Yarn Co.

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recovery of the same, if it be found necessary, to be by them placed in the British funds or otherwise laid out upon such security as they should deem sufficient." Now there is no doubt, upon the authorities, that the word "moneys," in a gift of "moneys" will pass stock in the funds, it being a question of construction upon the whole will, whether the testator meant to use the word in that sense or not. I cannot doubt that the words "take and receive all moneys in my possession or due to me at the time of my decease," looking at the general terms of the will and the authorities on the subject, were sufficient to pass this stock. Then, it was said, with some point, that the direction to take and receive all moneys in his possession or due to him at the time of his decease, cannot mean to refer to stock, because the testator goes on to direct the executors to prosecute for the recovery of the same, if it be necessary, to be by them placed in the British funds or otherwise laid out upon such security as they should deem sufficient. To consider that this direction destroys the generality of the word "moneys" as applicable to the stock, would be to take an advantage of a slip or inaccuracy of the testator in wording his will, when, in fact, the meaning is obvious. If he intended to give power to the executors to invest moneys not invested, *a fortiori* he must have intended moneys which he had himself invested to pass by the will. Upon the executors admitting that the debts and funeral expenses of the testator have been paid, declare that the plaintiffs are entitled in equal moieties to the consols.

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*Ex parte* THE EAST OF ENGLAND BANKING COMPANY; *In re* THE NORWICH YARN COMPANY.<sup>1</sup>

December 8, 9, and 11, 1851.

*Company Winding up Acts—Action.*

A joint-stock company overdraw its account with its bankers, and was subsequently ordered to be wound up. The amount of debt was disputed, and the public officer of the bank (also a company) carried in a claim before the Master, who refused to admit it as a claim until the debt was proved at law. The Master of the Rolls on appeal admitted the claim, and directed an action to be brought; but, upon appeal to this court, it was held, that although the order at the rolls was correct in remitting the claim, it must be altered by giving the public officer of the bank liberty to bring such action against such person or persons as he should be advised.

THIS was an appeal from an order of the late Master of the Rolls. The short facts were as follows:—In 1833, the Norwich Yarn Company was established, and a deed of partnership was executed on the 2d of August, 1834. In 1836, the East of England Banking Company became its bankers, and the account was overdrawn, and when

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<sup>1</sup> 21 LAW J. REP. (N. S.) CHANC. 822.

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the Yarn Company ceased trading in October, 1847, the amount was alleged to be 35,755*l.* 2*s.* 5*d.* In 1849, an order was made for the winding up the affairs of the Yarn Company, under which the public registered officer of the bank carried in a claim, on behalf of the bank, before the Master, for the above-mentioned sum and interest. The Master declined to admit the demand as a claim, and certified that he had so refused, he having at the hearing of the claim stated that it was his opinion that it ought to be established at law in the first instance. On an appeal to the late Master of the Rolls, Lord Langdale, he ordered the claim to be entered and admitted by the Master, and that the bank, by their public registered officer, should bring such action at law as they might be advised against the official manager of the Yarn Company to establish the demand. The Banking company appealed from this order.<sup>1</sup>

*Bethell, Roundell Palmer, Cole, and Willes* were for the appeal. The following cases were cited:—*Morgan's case*, 1 De Gex & S. 750; 18 Law J. Rep. (N. S.) Chanc. 265; *Ex parte Walters*, 3 Ibid. 156; s. c. 19 Law J. Rep. (N. S.) Chanc. 501; *Taylor v. Hughes*, 2 Jo. & L. 24; *King v. Hoare*, 13 Mee. & W. 494; s. c. 14 Law J. Rep. (N. S.)

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<sup>1</sup> The following observations fell from the LORD JUSTICE KNIGHT BRUCE during the argument:—"Is there any other question substantially before us than this, whether there is a rational legal question to be tried? Is there or can there be anything else? If it is plain to demonstration that the debt is due, it ought to be admitted; but if it is the subject of reasonable question, how can we admit it? This is not analogous to a case of bankruptcy, where the proof must be admitted because all the assets are swept away from the creditor, and a creditor's only resort is under the bankruptcy. Here all the creditor's rights remain as they were, subject only to this condition, that the legislature has imposed upon him the necessity before he sues of going in before the Master for some cause that appeared to the legislature sufficient. Even then the Master may say, as I understand the act of parliament, you may go to law at once, without an allowance or disallowance, otherwise the Master may go on, and allow or disallow. That does not prevent him suing, because after it is disallowed he may sue. The question is this. These acts of parliament are intended for the benefit of the contributories, as I consider, and only secondarily for the benefit of the creditors, whose cases are scarcely interfered with. I repeat, that, as it seems to me, before the debt is admitted on the books of the Master or the court as one to be paid, it ought to be clear to demonstration that there is not a legal question. . . . Suppose a creditor, or alleged creditor, in order merely to obey the act, goes before the Master and carries in half a sheet of paper, and says, 'I claim such a debt,' and carries in no evidence to support it, and the Master disallows it, then, unless I misconstrue the act of parliament, the creditor is at liberty to proceed at law, and is not affected by anything that takes place in the Master's office."—And upon the same subject LORD JUSTICE LORD CRANWORTH said, "What takes place in the Master's office clearly has nothing to do with the action that is pending. When that act of parliament first passed, a great number of applications were made to be at liberty to prove, but the courts refused to interfere. They said, all you have to do is to go to the Master, and exhibit such proof as you can, or such proof as you please: when you have done that, you have done all that was in the intention of the legislature, in order that the Master should know what are the claims against the company. It is useful that the Master should know the extent of the claims, that he may be regulated in making a call; but it is not intended otherwise to interfere with the creditor. The great object of the act was internal arrangement. Creditors are not put in the same case as where the assets are taken away from the debtor; the assets remain in the hands of the debtor, and creditors may proceed against him to recover the claim."



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Exch. 29; *Chapman v. Milvain*, 5 Exch. Rep. 61; s. c. 19 Law J. Rep. (N. S.) Exch. 228; *Upfill's case*, 20 Law J. Rep. (N. S.) Chanc. 480; s. c. 4 Eng. Rep. 128; *Beardshaw v. Lord Londesborough*, 18 Law Times, 76; *Bank of Australasia v. The Bank of Australia*, 12 Jur. 189.

*Roupell, Walpole, Crompton, and Busk*, for the respondents were not called on.

KNIGHT BRUCE, L. J. I am of opinion that the materials before the court do not enable us to say at present, with any satisfaction to ourselves, or with any reasonable certainty of doing justice, whether this is not, or is, a debt provable under the order for winding up this company; the consequence is therefore, that we are of opinion that the Master of the Rolls's order, so far as it directs the claim to be entered, and does not direct a proof, is perfectly correct. There remains only for consideration the manner in which the order appears to be expressed with reference to legal proceedings. It directs an action to be brought against the official manager. Subject to hearing what the respondents may say, we are of opinion that that should not be so expressed; but whether there should be liberty to bring any action or actions whatsoever against any person or persons, or whether there should be an issue or issues, or what should be done consistently with what I have stated, is a question for consideration. We neither disturb what has been done at the rolls as to the admission of the claim, nor as to the reservation of costs.

LORD CRANWORTH, L. J. I entirely concur in that view of the case. If I were to adopt the suggestion at the bar, and say that I must decide the case upon the materials before me, I should say that there is nothing made out to establish any claim whatever. I see enough to lead me to the conclusion, that very likely proof may eventually be able to be made. I think it is quite right to allow the party to make a claim; whether there is such a claim, and to what amount, must be decided by some proceeding at law.

Dec. 12th. An order was this day made—"That the demand of the East of England Banking Company by their public registered officer, against the Norwich Yarn Company, for the sum of 35,755*l.* 2*s.* 5*d.*, with interest from the 19th day of May, 1849, be entered and allowed by the Master as a claim only; that the East of England Banking Company, by their registered officer, or otherwise, be at liberty, on or before the last day of Hilary term next, to bring such action or actions at law against such person or persons as they may be advised;" and then followed special directions as to the time for commencing the action, &c.

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*In re Hewson.*


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*In re HEWSON.*<sup>1</sup>

May 28, 1852.

*Lunacy — Allowances out of Estate, in Confirmation of an Agreement before the Lunacy — Allowance to a Relation.*

Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death; and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; the court allowed the executors of the husband to deduct all the money paid for keeping up the establishment, after the lunacy, till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committee.

This was a petition by executors, praying the allowance of certain payments out of the lunatic's estate, and the sanction of the court to payments in respect of an arrangement which had been acted upon during the lunatic's lifetime. The facts were as follows:—The lunatic, Mrs. Anne Hewson, the widow of Mr. Thomas Ansaldo Hewson, a medical practitioner, was entitled to a large income, settled upon her for her separate use; and from the affidavits it appeared that on her marriage with Mr. Hewson, in 1823, an arrangement was made by which the lady's income was to bear the charges of the household expenses, and other charges of the domestic establishment, and that Mr. Hewson should provide for the expense of horses and carriages. This arrangement was acted upon down to the year 1845, when Mrs. Hewson was found lunatic, and from that time until his death, Mr. Hewson continued the same establishment, and received the whole income of his wife's estate. Mr. Hewson appointed executors of his will, who were called upon by the committees of Mrs. Hewson's estate to repay all the income of her property from the time of the lunacy up to his death, but the executors resisted the demand on the ground of the agreement, so far as that they claimed a set-off of so much as had been expended in the keeping up the establishment. This constituted the first part of the case.

The second part, also supported by affidavits, was this:—A nephew or grand-nephew of Mrs. Hewson had been placed by her at school, the expenses of which she defrayed; and when he left school she paid his fee for apprenticeship, and discharged all the costs of his maintenance, and at times intimated to him her intention to advance him in the world, and in particular promised him, before her lunacy, that she would give him 500*l.*, to set up in business for himself, in reliance on which he quitted a wholesale house of business where he was engaged, and she, on her part, so far redeemed her promise that she gave him 50*l.* After her lunacy, Mr. Hewson gave the nephew a check on the bankers, who kept an account of Mrs. Hewson's money, independently of that belonging to Mr. Hewson, for 250*l.*, and the same was duly

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 825.

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*In re Hewson.*

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honored. The executors of Mr. Hewson now desired to be allowed as a set-off to the demand of the committees of his wife's estate this sum of 250*l.*, which had been paid solely because Mrs. Hewson had promised the nephew the money.

*Malins* and *F. Wood* supported the petition.

*Bacon* and *Shapter* stated that the facts were wholly undisputed; and they left it to the discretion of the court to say whether any, or, if any, what allowance should be made and deducted from the money coming from the executors of Mr. Hewson, in respect of the agreement to keep the establishment, proved to have existed from the time of the lunacy to the husband's death, and also whether the 250*l.* ought to be also allowed, a question which would depend upon whether there was any moral obligation on Mrs. Hewson herself to have advanced the money, and if there were, then, whether Mr. Hewson could fairly be considered to have given the check in redemption of that moral obligation, it being admitted that the check being drawn on that particular account kept at the banker's, was favorable to such a view.

*Stuart, Young, and Borton* appeared for other parties.

KNIGHT BRUCE, L. J. Speaking for myself, as there is no evidence to rebut that, in support of the petition, I think that the arrangement between the husband and wife regarding the establishment must be taken to be proved; and the question is, what amount should be allowed.

LORD CRANWORTH, L. J. I am quite of the same opinion; and as it appears that the expenses were 550*l.*, or thereabouts, I think that sum should be allowed as a set-off, counting from the date of the lunacy to Mr. Hewson's death; and, therefore, that the gross amount of such allowance from that period will be deducted by the executors from the money they have to account for as the separate income of the lunatic.

KNIGHT BRUCE, L. J. We are both of opinion that there was on Mrs. Hewson a moral obligation, under the circumstances disclosed in the evidence, which is not disputed, to fulfil her promise to this gentleman, her nephew. No doubt can be fairly entertained that if she had remained of sound mind she would herself have fulfilled her kind intention on his behalf. Both Lord Cranworth and myself consider it to be a fair discretion to exercise to allow this sum of 250*l.* to the executors of Mr. Hewson in the account. After, therefore, deducting the annual sum of 550*l.* and the sum of 250*l.*, the executors must pay over the balance of the lady's income from the time of the lunacy to the date of Mr. Hewson's death, to the credit of the lunacy.

LORD CRANWORTH, L. J. Expense may be saved if this order is

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delayed until it can be incorporated with an order which may be made in the suit commenced or contemplated for the administration of the husband's estate. The order will be as we have stated, but it need not be drawn up at present.

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PEPPERCORN v. WAYMAN.<sup>1</sup>

February 11, 1852.

*Sale by acting Executors—Statute 21 Hen. 8, c. 4—Powers—Disclaimer.*

A testator devised his freehold estates to A, B, C, and D, and their heirs, on the usual trusts for sale. He then ordered and directed that A, B, C, and D, the executors of that his will, or the survivors or survivor of them, or the executors or administrators of such survivor, should sell his copyhold estates. He then gave all his personal estate to the same persons, and declared the trusts of all the moneys to arise from his real and personal estate. A died in the lifetime of the testator. The testator died in 1830. B, and C, sold the copyhold estates in 1832. In 1851, D executed the usual deed of disclaimer. There was no evidence that D had refused to accept the executorship before the sale in 1832:—

*Held*, first, that copyholds were within the 21 Hen. 8, c. 4; and, secondly, that, under that act the sale of the copyholds had been properly made by B and C.

WILLIAM BETTS, by his will, dated the 4th of January, 1822, devised all his freehold estates to H. C. Hoare, L. Waller, H. Waller, and M. Wells, and their heirs, upon the usual trusts for sale, and directed them to stand possessed of the purchase-moneys upon the trusts thereafter declared. The will then proceeded as follows:—

“And I do hereby order and direct, that the said H. C. Hoare, L. Waller, H. Waller, and M. Wells, the executors of this my will, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, as soon as conveniently may be after my decease, and they shall think fit, in such manner, &c., make sale of all and every my copyhold messuages, cottages, or tenements, farms, lands, and other hereditaments whatsoever, situate and being within and held of the manors of,” &c.—The testator then directed that they should stand possessed of the purchase-moneys on the trusts thereafter declared. The testator then directed that the receipts of H. C. Hoare, L. Waller, H. Waller, and M. Wells, or the survivors or survivor of them, or the executors or administrators of such survivor, should be good discharges to the purchasers of his freehold and copyhold estates. The testator then bequeathed all his personal estate to H. C. Hoare, L. Waller, H. Waller, and M. Wells, by name, on the usual trusts for conversion and sale. He then declared the trusts of the moneys arising from his real and personal estate. The testator appointed his four trustees to be his executors.

L. Waller, one of the trustees, died in the lifetime of the testator.

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<sup>1</sup> 16 Jur. 794; 21 Law J. Rep. (N. S.) Chanc. 827.

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The testator died in 1830. The will was proved by H. Waller and M. Wells alone.

In 1832, H. Waller and M. Wells sold the copyhold hereditaments devised by the will to Mr. Peppercorn, the plaintiff.

The plaintiff afterwards entered into a contract with the defendant, Mr. Wayman, for the sale of the above-mentioned copyhold estates.

In April, 1851, H. C. Hoare executed a deed of disclaimer, by which, after reciting that he had declined to act, and never had acted, and was desirous to renounce the trusts and executorship of the will, he disclaimed in the usual form.

The question in this suit was, whether the copyhold estates had properly been sold to the plaintiff by H. Waller and M. Wells.

By the statute 21 Hen. 8, c. 4, it is enacted, that where lands are willed to be sold by executors, and part of them refuse to be executors, and to accept the administration of the will, all sales by the executors that accept such administration shall be as valid as if all the executors had joined.

*Bacon* and *Smythe*, for the plaintiff, contended that the title was good, and cited *Adams v. Taunton*, 5 Madd. 436.

*Malins* and *Hardy*, for the defendant, contended that, as the power was given to the three surviving executors, it could not be exercised by two only. It was doubtful whether copyholds were within the act of 21 Hen. 8, c. 4. If they were, the defect was not cured by it, as there was no proof that Mr. Hoare had refused to act.

PARKER, V. C. I think that there is a good title. There is a devise by the testator, William Betts, to four persons, of freehold estate upon trust to sell, and then, in the ordinary course with respect to copyholds, a power is given to the same four persons (who are named as executors), and the survivors and survivor of them, and the executors and administrators of such survivor, to sell the copyholds. Then there is a bequest of personal estate upon trust to sell in exactly the same way; and then a direction that these persons shall apply the whole money, the proceeds of such sales, in a particular manner. One of the four died in the testator's lifetime. The three then became trustees precisely as if three only had been named in the will. As to one of these three there is nothing to show whether he acted or not. Nineteen or twenty years after the testator's death, he executed a deed of disclaimer, reciting that, from the time of the testator's death, he had declined to act and had never acted, and disclaiming all the trusts. The question whether the two trustees could act alone is not the same as to the freeholds and copyholds. Acceptance would have been necessary to have made him trustee of the freeholds, and the deed of disclaimer operates so as to put him in the position of never having been a trustee of them. The legal estate in these freeholds is in the two other trustees only, and they can execute the trusts of the will as to them. The question as to the copyholds is not the same. At common law, the power to sell them is an authority given to the three trustees and executors, which can-

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*In re The London and Birmingham, &c., R. Co.; Ex parte Carpenter's Executors.*

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not regularly be executed by fewer than the whole number. The statute 21 Hen. 8, c. 4, commences as follows:—"Forasmuch as a bargain and sale of such lands, tenements, or other hereditaments so willed by any person to be sold by his executors after his decease, after the opinion of divers persons, can in nowise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named," &c. Then there comes the provision referred to. It has been considered that this statute is declaratory. It was suggested in the argument that it does not apply to copyholds. I am not aware that there has ever been a doubt on the point. The question as to the copyholds differs from the question as to the freeholds, because there must be an actual refusal of one executor to act in order to enable the others to sell the copyholds without him. Now what have we here? We have a disclaimer which, if it is effectual at all, must be a refusal as to both the freeholds and copyholds, and, *prima facie*, that must be a refusal to act from the beginning. Is there anything to raise a doubt that this disclaiming executor did refuse from the beginning? If he did not, there would be a great irregularity in the sale by the two other executors without his concurrence. A disclaimer is *prima facie* evidence of a refusal from the beginning, and I have heard nothing to raise a doubt of the irregularity of this transaction. I have, therefore, no doubt that this title is good. I must give the title the benefit of the costs.

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*In re THE LONDON<sup>1</sup> AND BIRMINGHAM EXTENSION, AND THE NORTH-AMPTON, DAVENTRY, LEAMINGTON, AND WARWICK RAILWAY COMPANY; Ex parte CARPENTER'S EXECUTORS.<sup>1</sup>*

March 25, 26, and 29, 1852.

*Company—Winding-up Act—Breach of Trust—Misapplication of the Funds of a Company by the Committee of Management.*

A railway company was formed, and a large number of shares in it was allotted, and a considerable sum paid in respect of deposits on the shares. A managing committee of the company was appointed, and five of its members were appointed a finance committee, with power to draw checks. By the direction of the managing committee, large sums, part of the company's funds, were employed in purchasing shares in the market. The Master to whom the winding up of the company was referred, charged the members of the finance committee with these sums, on the ground that the managing committee was implicated in the breach of trust. The Master's order was overruled.

THE above-mentioned company was formed in 1845, and provisionally registered. A large number of shares in the concern was allotted, and a considerable sum was paid on account of deposits on the shares.

A managing committee of the company was formed, and five per-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 835; 16 Jur. 900.

*In re The London and Birmingham, &c., R. Co.; Ex parte Carpenter's Executors.*

sons, Sir J. E. De Beauvoir, R. Carpenter, S. N. Fisher, P. H. Edlin, and F. F. Weiss, members of the managing committee, were appointed a committee of finance, any three of whom were to form a quorum, with power to draw on the company's bank by checks, to be signed by not less than three, and to be countersigned by the secretary.

The managing body directed that very considerable sums, part of the funds of the company, should be expended in purchasing shares in the market, and checks were drawn by members of the finance committee on the company's bank for this purpose.

Mr. Carpenter died, having, by his will, appointed executors who proved his will.

The Master, to whom the winding up of the company was referred, charged Mr. Carpenter's executors, and the four surviving members of the finance committee with all the sums expended for the above-mentioned purpose, in respect of which checks were not produced, and charged all the sums expended for such purpose, in respect of which checks were produced, on the members of the finance committee who had signed them.

This was a motion to discharge the Master's order.

*Bacon and Hallett*, for Mr. Carpenter's executors.

*Daniel and Southgate*, for Mr. Weiss.

*Selwyn and Smythe*, for the official manager.

The following cases were cited — *In re St. Marylebone Joint-Stock Banking Company*, 1 Hall & Tw. 100; s. c. 18 Law J. Rep. (n. s.) Chanc. 81; *Parbury v. Chadwick*, 12 Beav. 614; s. c. 19 Law J. Rep. (n. s.) Chanc. 562; *Deeks v. Stanhope*, 1 Sim. (n. s.) 448; s. c. 5 Eng. Rep. 97; *Cox's case*, 3 De Gex & S. 180; s. c. 19 Law J. Rep. (n. s.) Chanc. 167; *Chadwick's case*, 15 Jur. 597; s. c. 5 Eng. Rep. 583; *Ex parte Inderwicke*, 3 De Gex & S. 231; *Hollinsworth's case*, 3 Ibid. 102, as to the Winding-up Act; and *Booth v. Booth*, 1 Beav. 125; s. c. 8 Law J. Rep. (n. s.) Chanc. 39; *Fenwick v. Greenwell*, 10 Beav. 412; *The Attorney General v. Wilson*, Cr. & Ph. 1; s. c. 10 Law J. Rep. (n. s.) Chanc. 53; *The Charitable Corporation v. Sutton*, 2 Atk. 400; *Stiles v. Guy*, 1 Hall & Tw. 523; 1 Mac. & G. 422; s. c. 19 Law J. Rep. (n. s.) Chanc. 185; *The Attorney-General v. The Corporation of Leicester*, 7 Beav. 176, as to the breach of trust.

PARKER, V. C. I have come to the conclusion that the Master's order cannot be sustained consistently with the principles and practice of the court. The circumstances are that five individuals, with several others, were members of the managing body, and that these five were appointed to be a finance committee, with power for any three of them to sign checks, which were to be countersigned by the secretary. It is admitted on both sides that some, if not all, of the five, acting by the direction of the managing body, employed the funds of the company, to a large amount, in buying up shares in the

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*In re The London and Birmingham, &c., R. Co.; Ex parte Carpenter's Executors.*

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company. The Master, by his order, has, in fact, charged these persons with the moneys which they were instrumental in applying for the purchase of these shares. I should be extremely sorry to say anything intimating any difference of opinion from the conclusion to which the Master has come as to the proceeding in question, which he has rightly characterized as a breach of trust in the application of the funds of the company. It is possible that there may be an explanation given of it, but I have not heard any. I do not in the least differ from the view which the Master has taken. It appears to me to be a misapplication of the funds of the company, tending, as had been put by Mr. Selwyn, in the course of his argument, to destroy the very object for which the money had been put into the hands of the directors. Whatever jurisdiction the Master may or may not have under the act, he certainly has all the jurisdiction necessary for taking the ordinary accounts, and enforcing the ordinary liabilities. In carrying out the act of parliament another class of liabilities, not of the ordinary kind, may arise. It is not necessary to consider this point in the present case. It appears to me that the vice of the Master's order is this, that it assumes that the five individuals, where there was no check forthcoming, or three of them, where there were checks, were the parties who, as between these persons and the company were solely and ultimately chargeable with the moneys misapplied. It assumes that complete justice would be done in the case by making these persons, who were the hands of the governing body, solely liable by making an order for the restitution of the funds to be applicable as funds in which the whole of the company had a benefit. When it is considered that these acts were done under the direction of the governing body, and that the object of this proceeding is to wind up the company, and to settle all matters as between all the members of it, it is certain that the object would fail if the court were to proceed upon the principle of making these persons solely liable, who, no doubt, were implicated in the misapplication of the money, but not more so those other persons who were not charged. If this money be recovered, the very persons who had directed a misapplication of it would have the benefit of the fund being brought back. It seems to me that all persons who were implicated in the transaction are jointly and severally liable, and that there is an obvious distinction between the present case and *The Attorney-General v. Wilson*, and that class of cases, where the application was to have the funds restored on behalf of the company, no members of which were implicated in the misapplication of them.

Being of opinion that there was a misapplication of the funds, it appears to me, with regard to the mode of proceeding, that it is not consistent with the ends of justice that it should be of so simple a kind as the Master has considered. The transaction was much more complicated than to enable him to treat these parties as being merely liable to bring back these funds. I have very little doubt that some other course will be found to enable the Master to investigate what had been done. The Master's order must be discharged, and the costs be reserved, with liberty to apply.



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 Turner v. Turner.
 

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TURNER v. TURNER.<sup>1</sup>

June 2, 1852.

*Will—Power—27th Section of the Wills Act.*

- A testator bequeathed certain property to A, for life, with remainder to such persons as A should, by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed and delivered in the presence of, and attested by two or more witnesses, appoint. A made a will, dated after the operation of the Wills Act:—

*Held*, that the will was an execution of the power.

A, having a power of appointment over a sum of consols, some leasehold ground-rents, and some shares in an insurance company, made a will, by which she bequeathed all her real estate, money, and securities for money, to B, and all the rest, residue and remainder of her personal estate to C:—

*Held*, that all the property subject to the power passed by the will, and that B was entitled to the consols, and C, to the shares and ground-rents.

J. H. GREEN, by his will, gave certain property therein mentioned to trustees upon trust for his wife for life, and, after her decease, for such persons as his wife should, by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed, and delivered in the presence of and attested by two or more witnesses, appoint, &c.

The testator died in 1830.

A part of the property made subject to the power consisted of a sum in consols, certain leasehold ground-rents, and some shares in an insurance company.

Mrs. Green, the widow, made her will, dated after the operation of the new Wills Act, and thereby gave all her real estate and such part of her personal estate as should consist of money or securities for money to the persons therein named, and gave all the rest, residue and remainder of her personal estate to certain other persons therein named.

The questions in this suit were: first, whether Mrs. Green's will was an execution of the power; and secondly, what part of the property, if any, subject to the power passed under the terms "real estate and such part of her personal estate as should consist of money or securities for money," and what part under the term "rest, residue and remainder of her estate."

*Follett and Kinglake*, for the plaintiff.

*Headlam, W. M. James, Bacon, Bazalgette, Russell, Pitman, Wigram and Wigglesworth*, for the different parties.

The following cases were cited — *Kibbett v. Lee*, Hob. 312; the cases referred to in 1 *Sugd. on Powers*, 263, 7th edit.; *Francombe v. Haynard*, 9 Jur. 344; *Curteis v. Kendrick*, 3 Mee. & W. 461; s. c. 7 Law J. Rep. (N. s.) Exch. 169.

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<sup>1</sup> 21 Law J. Rep. (N. s.) Chanc. 843.

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*In re The Merchant Traders', &c., Assurance Association; Ex parte Lord Talbot.*

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PARKER, V. C., said that, first, upon the authorities, independently of the Wills Act, the will was a good execution of the power. The next question was, whether the bequests by the will came within the 27th section of the Wills Act. [His honor read the section.] He thought that, in both parts of the will, there was a bequest of property "described in a general manner," and therefore, under one part or another, the legatees under the will were entitled to the whole property, subject to the power. Now, the consols passed under the words "securities for money;" but as to the ground-rents and insurance shares he wished to hear the reply.

*Follett* replied.

PARKER, V. C., said, that he thought the shares in the insurance company did not pass under the bequest of money or securities for money; and that the leasehold ground-rents did not pass under the term "real estate." All, therefore, that the legatees of the real estate, money and securities for money would take would be the consols, and the rest would go to the residuary legatees.

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*In re THE MERCHANT TRADERS' SHIP, LOAN, AND ASSURANCE ASSOCIATION; Ex parte LORD TALBOT.*<sup>1</sup>

March 9, 1852.

*Company — Winding-up Act — Calls — Policies of Assurance.*

A subscribed the deed of settlement of a joint-stock company, instituted for the purpose of granting assurances on ships, for 1,000 shares of 25*l.* each. By the deed of settlement it was declared that a deposit of 2*l.* 2*s.* should be paid on each share, and that a further call of 2*l.* 2*s.* might be made by the directors, but that no further call should be made without a previous resolution of the shareholders assembled at a general meeting. The company granted several policies. The company was afterwards made bankrupt, under the 7 & 8 Vict. c. 111, and debts were proved against it to the amount of 70,000*l.*, and upwards. It was afterwards ordered to be wound up under the Joint-stock Companies Winding-up Act. The Master placed A on the list of contributories, and made an order that he should pay 25,000*l.* Motion, that the order as to the call should be discharged was refused.

THE above-mentioned company was projected and provisionally registered in 1845, the object being to effect assurances on ships and procure loans.

The deed of settlement of the company was signed by Lord Talbot, in respect of 1,000 shares of 25*l.* each. Mr. Winthrop also signed the deed of settlement, in respect of the same number of shares. The 127th clause of the deed of settlement is as follows:—

"That the original capital shall be paid up, and contributed in such portions and at such times as the board of directors shall from

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<sup>1</sup> 16 Jur. 855; 21 Law J. Rep. (N. S.) Chanc. 846.

*In re The Merchant Traders', &c., Assurance Association; Ex parte Lord Talbot.*

time to time fix and determine in that behalf, so that every portion of the original capital which shall be required to be paid and contributed shall be set and calculated upon the whole amount of the said original capital, ratably and distributively, whether the whole or such original capital shall have been taken and subscribed for or not; and every such portion shall be taken and divided into aliquot parts or proportions, and apportioned to the shares into which the capital shall be divided; and that every person, who at the time of the making or passing of the order or resolution by which such portion shall be fixed and determined upon, and required to be paid or contributed, shall be an owner or proprietor of, or subscriber for, or shareholder in respect of any share of such capital, and shall, whether registered in the register of shareholders or not, be liable to pay and contribute, for the purposes of the company, and at the time and place which shall be fixed or determined by the said board of directors in that behalf, the aliquot part which shall be apportioned to his share of such capital, and such aliquot parts shall be treated and considered as an instalment of capital due upon or in respect of a share held by him, or a call or instalment within the meaning of the said statute, and may be sued for, and recovered as such, according to the provisions of the said statute, and as herein also provided." The 128th section is as follows: "That a deposit of 2*l.* 2*s.* per share shall be payable by every person desirous of being a shareholder, within such period after any shares shall have been allotted to him by the company, subsequent to the same having been so allotted as the directors shall appoint; and that a second call, not exceeding 2*l.* 2*s.* per share, may be made by the board of directors, within six months after a resolution shall have been come to by the board of directors, declaring that such first call of 2*l.* 2*s.* per share has been made by them; but that no further call or instalment whatsoever shall be payable by any shareholder without a previous resolution of the shareholders of the company assembled at a general meeting, competent under these presents, to make such further call or instalment."

The company proceeded to carry on business, and granted several policies.

On the 8th of May, 1848; a fiat bankruptcy issued against the company, under the 7 & 8 Vict. c. 111, and debts were proved against the company to an amount of upwards of 70,000*l.*

An order was afterwards made for winding up this company, under the Joint Stock Companies Winding-up Act.

The Master charged with the winding up of the company placed Lord Talbot on the list of contributories, and made a call on him for 25,000*l.*

This was a motion that the order as to the call might be discharged.

Each of the policies granted by the company contained the following proviso:—"Provided always, and it is hereby expressly declared and agreed, between and by the said company and the assured, that the said policy and anything therein contained shall in no case extend or be deemed or construed to extend to charge or render liable the respective proprietors of the said company, or any of them,

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*In re The Merchant Traders', &c., Assurance Association; Ex parte Lord Talbot.*

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or any of their heirs, executors or administrators, to any claim or demand whatsoever in respect of the said policy or of the insurance thereby made, beyond the amount of their, his, or her respective individual shares or share in the capital stock of the said company; but that the capital stock and funds of the said company shall alone be charged and liable to answer all claims and demands, by virtue of the said assurance or incident thereto."

In Trinity term, 1849, Mr. Halkett, a creditor on a policy, recovered judgment against the company, and obtained a rule calling on Lord Talbot to show cause why execution should not issue against him. This rule was discharged. This is the case of *Halkett v. The Merchant Traders' Ship, Loan and Insurance Association*, 19 Law J. Rep. (N. S.) Q. B. 59. The court of Exchequer decided in the same way in *Hassell v. The Merchant Traders' Ship, Loan and Insurance Association*, *Ibid.* Exch. 183.

*Daniel and Baggallay*, for the motion.

*Roxburgh*, for the official manager.

*Daniel* replied.

The following cases were cited — *The Queen v. The Victoria Park Company*, 1 Q. B. Rep. 288; *Smith v. The Hull Glass Company*, 19 Law J. Rep. (N. S.) C. P. 123; *Halkett v. The Merchant Traders' Ship, Loan and Insurance Association*, and *Hassell v. The Merchant Traders' Ship, Loan and Insurance Association*.

PARKER, V. C. I do not consider that the cases which have been decided at law upon the rules to show cause why execution should not issue against Lord Talbot and Mr. Winthrop govern this motion. These cases only establish that policy holders cannot at law sue any individual shareholder of the company; and they leave untouched the question whether the claims of the policy holders, by virtue of their policies, are in the nature of a charge upon the property or assets of the company, which can only be enforced in this court by a bill, or under the Winding-up Act, or in the Bankruptcy Court under the Bankruptcy. I do not entertain a doubt that the policy holders, by force of their policies as general creditors, or by force of the Bankruptcy Act, or under the Winding-up Acts, must have a claim upon the general funds or assets of the company, whatever they may be. This leads to the question, what does the property or assets of the company consist of? It consists, among other things, of the capital subscribed, that is, of the sum which the different shareholders agreed to subscribe towards the funds of the company, amounting in Lord Talbot's case to 25,000*l.* and in Mr. Winthrop's case to the same amount. This *prima facie* they are liable to pay. If I had found in the deed any express stipulation that these sums should be paid at a fixed period or by yearly instalments, or in any particular way, I should have felt great difficulty in saying that they were to pay it in

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*In re The Merchant Traders', &c., Assurance Association; Ex parte Lord Talbot.*

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any other way. But I find no such stipulation in the deed. There is a provision to subscribe a certain amount. The 127th and 128th clauses of the deed provide for the payment of this sum by means of machinery which does not now exist, namely, meeting of the company; but there is no stipulation that the shareholders should have the benefit of deferred payments. It appears to me that it is right to consider Lord Talbot, as the Master had considered him, liable, by force of the provisions of the deed, to contribute the sum of 25,000*l*. Taking this view of the question, I do not think I should in any way contravene the 58th section of the act of 1848, which provides "that nothing therein contained should extend or enlarge, diminish, alter, or affect the rights or remedies of creditors," which could in one way or another be made available for their benefit to the extent of the amount of the subscriptions which the shareholders had thought proper to agree to make.

It has been said that this form of proceeding deprived the different shareholders or contributories of the right they would otherwise have had of disputing each debt. There was a large number of debts found by the Master to an amount exceeding that which was called for. In my opinion, the amount subscribed for by Lord Talbot and Mr. Winthrop is liable to be called for to discharge these debts. There is nothing to prevent any contributory from putting any person, who is upon the list of creditors, to the proof of his debt. I do not think it necessary to entitle a creditor to receive payment that he should previously have established his debt at law. Before the Master, and upon the bankruptcy proceedings, it would appear that he had proved his debt, and that he was *primâ facie* a creditor. Any contributory might take the necessary steps for questioning the debt and putting it upon a proper footing, if it should turn out not to be an available claim or debt. It, therefore, appears to me that the Master has come to a right conclusion in saying that, having regard to the amount of debts *primâ facie* proved before him, the contributions which the appellants had agreed to make towards the company should be made, so as to render available the funds or property of the company to meet the demands upon it. As to the question of *quantum*, the call was for the amount to be subscribed. It was admitted that, if there had been any payment made, the parties were entitled to have the benefit of a set-off as to that. This does not affect the right to make the call. The parties may claim a set-off, if any, of the official manager; and, if he declines to allow it, they may go before the Master or come to the court to have it allowed, not on the footing of undoing the call that had been made, but of establishing the amount of the call. The official manager must have his costs of this motion out of the estate. I do not think the question has been unnecessarily brought before the court.

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 Atkinson v. Gylby.
 

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 ATKINSON v. GYLBY.<sup>1</sup>

April 27, 1852.

*Insurance Company — Transfer of Policies — Bond.*

A sum of money was borrowed from an insurance company, and a bond was given to secure the repayment of the money. The borrower at the same time insured his life as a further security, and the bond extended to the payment of the premiums for keeping up the policy. The insurance company having ceased to carry on business was dissolved, and the affairs being wound up, the company transferred, amongst other things, this bond and policy to another insurance company. No premiums were paid to the second company, and the policy was allowed to drop. The surety in the bond died, and the second insurance company claimed to be creditors against his estate for the amount of premiums unpaid, on the ground that the policies ought to be kept on foot until the money due upon the bond had been paid:—

*Held*, as regarded the premiums, that this was not such a contract as the assignees of the first insurance company could enforce, although they had a good claim against the estate of the surety, *quoad* the amount secured by the bond.

THIS suit was instituted by the creditors of a testator, named John Parker Gylby, for the administration of his estate, and a claim had been carried in before the Master by the trustees and directors of a company called the Britannia Life Assurance Company, alleging themselves to be creditors upon the estate under the following circumstances:— From the state of facts taken in before the Master, it appeared that by a policy of assurance, dated the 15th of July, 1841, under the hands of three of the directors of the London and Westminster Mutual Life Assurance Society, the sum of 1,000*l.* was assured upon the death of William Edwards to his executors, administrators or assigns, upon payment by him to the directors of the society for the time being, at the office of the said society, of the yearly premium of 39*l.* 5*s.* That by another policy of assurance, dated the 20th of January, 1842, also under the hands of three of the directors of the London and Westminster Mutual Life Assurance Society, a further sum of 1,000*l.* was assured upon the death of the said William Edwards to his executors, administrators or assigns, upon payment by him in like manner of the annual premium of 40*l.* 11*s.* 8*d.* That by a bond or obligation in writing, under the hands and seals of the said William Edwards and of Frederick Edwards and John Parker Gylby, the testator in this cause, dated the 7th of February, 1842, the said W. Edwards as principal, and the said F. Edwards and J. P. Gylby as sureties for W. Edwards, became jointly and severally bound to David Salomons and H. M. Kemshead, two of the directors of the London and Westminster Mutual Life Assurance Society, in the penal sum of 900*l.*, with a condition, whereby, after reciting that W. Edwards having occasion for the sum of 450*l.* had requested the said David Salomons and H. M. Kemshead to lend him the same, which they had agreed to do, upon having repayment

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 848.

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*Atkinson v. Gylby.*

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of the said sum in manner therein mentioned, and interest thereon secured by this bond, it was declared, that the bond should be void upon payment by the said W. Edwards, his heirs, executors or administrators, unto the said D. Salomons and H. M. Kemshead, their executors, administrators or assigns, of the sum of 450*l*. in the proportions, and at the times therein mentioned, with interest thereon at the rate of 5*l*. per cent. per annum, and the following clause was added:— And also do and shall so long as any money shall remain due on the security of the above-written bond or obligation, well and truly pay, or cause to be paid, the several annual premiums payable in respect of the said two several policies of assurance, and all other payments whatsoever that shall be requisite or necessary for keeping the same on foot; and if the said W. Edwards shall not, during such time as aforesaid, do any act whatsoever, whereby the two several policies may be, or might be, liable to be forfeited, then and in such case the above-written bond or obligation shall be void, or otherwise shall remain in full force and effect." That by another bond, dated the 19th of December, 1842, between the same parties and in the same terms as the last, the sum of 500*l*., also borrowed by W. Edwards from the London and Westminster Assurance Society, was secured, together with the premiums payable upon the policies of assurance. That the moneys so paid by the said D. Salomons and H. M. Kemshead were the proper moneys of the London and Westminster Assurance Society; and the said two bonds were made to them as trustees for the same society. That J. P. Gylby died on the 27th of June, 1843. That in October, 1844, the London and Westminster Assurance Society ceased to carry on business as a life assurance society; and thereupon the affairs of the society were wound up, and the society was dissolved, and ceased to exist; and since the month of October, 1844, there had been no directors of the society, and no society of that name; nor had the said society, since that time, had any office for the transaction of business; and the capital, stock, funds, and property of the society were shortly afterwards distributed amongst the shareholders and members thereof, according to their shares and interests therein. That, by an indenture of assignment, dated the 13th of December, 1844, the said D. Salomons and H. M. Kemshead, as the trustees of the London and Westminster Assurance Society, assigned to several persons, therein named as trustees and directors of the Britannia Life Assurance Company, (among other things,) the said two several hereinbefore stated bonds, and the principal and other sums secured thereby, and all interest due or to become due in respect of the said sums, or any of them, and the said several policies of assurance, subject nevertheless as to such policies of assurance, to such rights of equity of redemption as were then subsisting thereof. That the London and Westminster Society was dissolved, and the affairs wound up, and the aforesaid assignment to the Britannia Company executed without the knowledge or privity either of J. P. Gylby, during his life, or the present defendant, his representative. That the premiums which became due on the said policies, up to January, 1845, were duly paid by W. Ed-

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*Atkinson v. Gylby.*

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wards, but none of the premiums upon either policy had since been paid. That by reason of the nonpayment of such premiums, within twenty days after they became due, the two policies had become absolutely void, and the same had never been revived. The claim made by the directors of the Britannia Life Assurance Company against the estate of J. P. Gylby, was for payment of the premiums upon the two policies, on the ground that such policies ought to be kept on foot until the money due upon the bonds should have been paid. They also claimed a liability against the estate of J. P. Gylby, in respect of the two principal sums of money secured by the two bonds. The defendant, Cassandra Gylby, objected to the claim, as far as regarded the premiums, and charged that there was not now due or owing to the trustees and directors of the Britannia Assurance Company from the estate of J. P. Gylby any sum or sums whatsoever, for or in respect of the annual premiums reserved by the before-stated policies of assurance.

The Master reported in favor of the claim carried in by the trustees and directors of the Britannia Life Assurance Company; and the case now came on upon exceptions to that report, the exceptions extending only to the amount claimed for premiums.

*Bethell* and *Haldane*, appeared in support of the exceptions, and said, the question was, whether the directors of the Britannia Life Assurance Company were or were not creditors of the testator, J. P. Gylby, for the amount of premiums upon the two policies which had been allowed to drop upon the transfer by the London and Westminster Assurance Society to the Britannia Company. The rule was, that if any of the terms of a contract were altered, a new contract was substituted, and the surety was no longer bound by it. The surety in this case contracted with the London and Westminster Society and not with the Britannia Company. The transfer was made between the two companies without his knowledge or concurrence. It was evident that Mr. Gylby never intended to be bound to the Britannia Company, and his obligation virtually came to an end. A contract of this nature rested mainly upon the solvency and responsibility of the company, and the surety had no opportunity of obtaining information upon these important points as regarded the Britannia Company.

*Malins* and *Cairns*, in support of the Master's report, referred to the terms of the bonds. The surety was thereby bound to see that the premiums were regularly paid upon the policies. It was admitted that the Britannia Company had a good claim against the testator's estate in respect of the sums secured by the two bonds. No exceptions were taken to that part of the case. The grounds were the same respecting both liabilities. The premiums were to be paid to the trustees of the London and Westminster Society, their executors, administrators, or assigns. Now, they had assigned their interest to the Britannia Company, who must necessarily stand in the same position as the first company. It was not a new contract that



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was now set up, but the same contract. This claim was simply one by the assignee of a chose in action, which was of every day occurrence. If the arguments on the other side were worth anything, they must apply to the capital and interest secured by the bond as well as to the premiums.

KINDERSLEY, V. C. I think in this case that the Master was wrong, and that the exceptions must be allowed so far as regards the premiums. I will go upon the assumption in the first place, that instead of its being a suit to administer the estate of the surety it was to administer the estate of Edwards. The facts are these, — I will state the case as respects one policy and bond, because the same principle applies to the other: — Edwards then, it appears, borrows a sum of 500*l.* from the London and Westminster Assurance Office; and to secure the repayment of the money with interest, he gives his bond, which is a bond in the usual way, payable to the obligees as trustees of the insurance company, and is assignable in equity, subject to all the equities that would be applicable to an ordinary mortgagee; but, besides borrowing that sum of money, there is another transaction: the office says to him, “we will not lend the money except you do something more; you must insure your life for 1,000*l.*, and you must pay a yearly premium for the insurance, and you must be compellable to pay the premiums so long as the debt remains due, after which you may leave off such payments.” It is clear that in this transaction the office gains a benefit by having the premiums paid, which is an additional profit to the interest upon the money borrowed, and they also have the money secured by the policy as an additional security for the amount lent; but, on the other hand, there is the benefit to the party insuring, that by paying the premiums there will be payable upon the death of such party the amount insured, that is, 1,000*l.* Then the bond is made to secure the 500*l.* and interest, which is one portion of the transaction, and it is also made to secure the payment of the premiums, which became a charge on the funds of the insurance company, as well as on the individual directors of the company. If the transaction had consisted only in the borrowing a certain sum of money and repayment with interest, it is clear that the benefit of that transaction would be assignable in equity to any individual, and in equity the plaintiff would have the benefit of it.

But let us look to the other portion of the transaction. Leave out of consideration that portion which concerns the borrowing of the money and take an individual who has entered into a policy and bound himself to keep up the premiums. That transaction is entered into upon the faith that the office will continue to be the effective and substantial office it was at the time the policy was effected, and that it will continue to carry on the business of life insuring, and have the means of providing payment when the policy becomes due out of the funds of the company. But when that office, either from insolvency, or not having business enough to make it profitable, or from any other cause, is unable to continue and must give up the carrying

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*Atkinson v. Gylby.*

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on of the concern, and more than that, is actually dissolved by an order of the court, and the affairs ordered to be wound up, can any one representing that office say, "Although we have ceased to be a working office and are not carrying on business, so that we may not have funds to make the payment, still we will compel you to go on paying the premiums?" Could the official manager appointed in such a case by the Master under a winding-up order maintain an action against those persons who had insured their lives, to make them pay the amount of their premiums? I apprehend not. I think in a court of law it would be an answer to such an action to say, the contract is at an end either by the act of the legislature, or the contracting party who is unable to perform his portion of the contract. I am sure it would be an answer in a court of equity.

In this case the transaction consists of two portions, of the portion which secures the money borrowed, and that relating to the premiums; and if this were a question arising upon the winding up of Edwards's estate and not his surety, though there might be good security for the sum borrowed, there is no longer any liability to the directors of the London and Westminster Assurance Office for the premiums. Now, it is clear that with regard to the transactions which took place between the two offices, the party has a right to say he repudiated the Britannia Company. It is true the money secured by the bond is made payable to the directors, their executors, administrators, or assigns, and no doubt a common bond is assignable to any party. It is contended, however, that that alone is sufficient to justify the Master in allowing not only the directors of the first, but also those of the second office to stand as creditors for the money in the bond, and also for the premiums; but it does not follow that the whole of this contract, which is a mutual contract, might be the subject of assignment. If it could be so, and without the consent of the contracting parties, it must equally be the subject of assignment to any individual who might just have come out of the Bankrupt Court, with perhaps a certificate of the third class. It could never be said that the contract, because it was made with the directors or their assigns, might be assigned so as to allow the company standing in the position of assignees of the original company, to compel performance of such a contract. So even if it were a question affecting the estate of Edwards himself, I think the acceptance should be allowed; but the case is much stronger with regard to the surety, because there is a material variation of the contract as to the surety, which puts an end to his liability. When you look at the contract, it was one in which, if the London and Westminster Society continued acting in their business, and were a solvent and substantial company, what would be the position of the surety? If he were called upon to pay any portion of this sum secured by the bond, he might say, "If I pay any moneys which Edwards ought to have paid, I shall have a right to have the benefit of such sums secured by the policy, and to claim as against the representatives of Edwards the repayment of that money before they receive any portion of it;" but that is all put an end to, and the surety would have to pay the premiums as well as the debt, without

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Heward v. Wheatley.

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being able to resort to the amount secured on the policy. I admit it does not put an end to Gylby's liability *quoad* the amount of the bond, but it does so as to the premiums. The exceptions must, therefore, be allowed.

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### HEWARD v. WHEATLEY.<sup>1</sup>

*Joint Stock Banking Company under 7 Geo. 4, c. 46 — Deceased Partner.*

February 28, and May 24, 1852.

In April, 1847, a joint-stock banking company, carrying on business under the provisions of the 7 Geo. 4, c. 46, of which A was a member, became indebted to B in the sum of 5,000*l*. A continued to be a partner until his death, and died in December, 1847. In April, 1848, B recovered judgment against the public officer of the company. In December, 1848, the usual decree for accounts was made in a suit for the administration of the estate of A. B presented a petition for liberty to go in before the Master and prove, as a creditor against A's estate, for 5,000*l*. and interest. The petition did not state that the bank had ceased to carry on business, or that any proceedings had been taken to enforce the judgment against the existing partners. The petition was dismissed.

THE facts of this case sufficiently appear in the judgment.

*Malins and Toller*, for the different parties.

The following cases were cited — *Barker v. Buttress*, 7 Beav. 134; s. c. 13 Law J. Rep. (N. S.) Chanc. 58; *Steward v. Greaves*, 10 Mee. & W. 711; s. c. 12 Law J. Rep. (N. S.) Exch. 109; *Wilkinson v. Henderson*, 1 Myl. & K. 582; s. c. 2 Law J. Rep. (N. S.) Chanc. 190.

PARKER, V. C. This is an application on the petition of George Wilson, praying that he may be at liberty to go in before the Master, to whom this clause stands referred under a decree in the cause, and to prove as a creditor of the testator, Joseph Elder, for the sum of 5,958*l*. 16*s*. 8*d*., the balance now remaining due for principal money on his debt, together with interest thereon at 5*l*. per cent. per annum, from the 3d of April, 1849. It appears that the testator in his lifetime, and up to the time of his death, was a member of the Newcastle, Shields and Sunderland Union Joint-Stock Banking Company, which was a banking copartnership carrying on business under the provisions of the 7 Geo. 4, c. 46. On the 3d of April, 1847, upon a deposit of money by the petitioner with the bank, which constituted a debt due from the bank to him, the bank gave an accountable receipt carrying interest at 5*l*. per cent. per annum to the petitioner. The testator at this time was a partner in the bank, and he continued so up to the time of his death. He died on the 8th of December, 1847, and on the 19th of April, 1848, the petitioner recovered judgment in an action at law against the public officer of the company for the sum mentioned in the prayer of this petition. On the 22d of De-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 854.

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Heward v. Wheatley.

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ember, 1848, a decree was pronounced in the present cause, which is an ordinary administration suit, directing an account to be taken of the testator's personal estate and debts in the usual way.

Independently of the before-mentioned statute, the case would admit of no doubt. On the death of the testator his liability on the contract would have ceased, but his assets would have continued liable in equity. In this case, however, the liabilities are regulated by the statute. The courts of law and equity have found a difficulty in acting on that statute, and its enactments are found on judicial authority to be inconsistent with each other, and not entirely intelligible. The first section appears to create a several liability on the part of the several members to pay all bills and notes issued by the company, and all sums borrowed and owed by the company, and it has frequently been noticed that this clause extends the ordinary liability, and includes various classes of members of the company. There is nothing to take away the liability which in equity would attach to the assets of a deceased partner, who is a party to the contract, as the testator is in this case. The 11th section relates to decrees of courts of equity recovered against the public officer. I notice that, because it is difficult to reconcile the provisions as to decrees in equity with those as to judgments at common law. A decree of this court may be a simple order to pay money, as simple as a judgment of a court of law. By the 11th section a decree for payment of money is to be enforced against every or any member of such co-partnership in the same manner as if they were parties before the court.

The very special provisions of the 13th section are not to be found in this 11th section, as applicable to a decree which is to result in the payment of money. The 13th section provides the means of enforcing judgments at law. The 11th section appears to give to a judgment the same effect as a decree in the court of equity against the public officer of the company. The 13th section contains most important provisions applicable to the mode of enforcing execution upon a judgment against the public officer at common law. By that section, execution is first to be issued against any member or members for the time being of the co-partnership, and the Court of Exchequer, in the case of *Dodgson v. Scott*, 2 Exch. Rep. 457; s. c. 17 Law J. Rep. (N. S.) Exch. 321, decided that "the time being" means the time of the execution. Execution must first be issued against the persons who are members of the partnership at the time of the execution, and in case that should be ineffectual for the purpose of obtaining satisfaction, then execution may be issued against certain persons who have ceased to be members before that time. This section provides only the mode of issuing execution against those persons who are liable at law. If the assets are liable in equity only, this clause contains no means by which that liability may be enforced. It appears to me that it does not follow that there is to be no liability in equity. The state of the law and the previous sections of the act appear to show that there is to be a liability in equity; and, if that be so, that liability must be enforced according to the ordinary principles of this court, be-

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Langhorn v. Langhorn.\*

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cause there is nothing about it in the clause pointing out how a judgment at common law is to be enforced against the parties legally liable. In asserting an equitable liability against the assets of a deceased partner, however, I think that regard must be had to those provisions of the act which would have been applicable if it had been a legal liability, according to the view taken by Lord Langdale in the case of *Barker v. Bulltress*.\*

One of the most material provisions of the 13th section of the act is, that a creditor of the partnership is in the first instance to issue execution against the members for the time being, and only in case that execution proves insufficient is execution to be issued against other parties. The reason of that is very obvious. The members for the time being are those who have control over the assets of the partnership, and those who have ceased to be partners have no such control. The object is to provide a mode of first rendering liable the funds of the partnership, which are primarily liable to pay the debt, by issuing against those who have the control over these funds in the first instance, and execution is not to go against those who have no control over the funds until the others have been found not to be available. This is an application to enforce the equitable liabilities of a deceased partner, in the same way as if he had ceased to be a member by a transfer of his interest; and, therefore, it appears to me that the petitioner must first show that the liability cannot be satisfied by proceedings against those who were members of the partnership at the time. In the present case, no such statement is made; there is no statement that the bank has ceased to carry on business, or that there has been any attempt to enforce judgment against those who are primarily liable, and, therefore, he has not made out his case to reach those who are liable in the second degree. There must be no order, but the statute is so difficult that I think it is not a case for costs.

*Petition dismissed, without costs.*

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LANGHORN v. LANGHORN.<sup>1</sup>

July 28, 1852.

*Trustee Act, 1850 — Vesting Order — New Trustees.*

In cases where new trustees are appointed under the Trustee Act, 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance.

This was a petition for an order vesting real estate in new trustees under the Trustee Act, 1850.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 860.

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*Lewis*, for the petition.

*Toller, Spring Rice, Snape, and Cumming*, for other parties.

PARKER, V. C. I wish it to be understood in this and every other case that, as a general rule, a conveyance ought to be made, and that the vesting order should only be resorted to in the case of its being inconvenient to obtain a conveyance, and I do not regard expense as coming under the term inconvenience. There is this reason: the statements in and the prayer of a petition seeking for a vesting order ought to be framed as carefully as the recitals and the operative part of a deed of conveyance; but petitions are not unfrequently drawn by persons who have not competent skill or time to frame them as they ought to be prepared for this purpose. I think then that, for the security of titles there ought to be conveyances. I have had before me several cases in which I have been applied to to discharge vesting orders—matters having been discovered subsequently to their being made which have rendered them ineffectual.

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OWEN v. BRYANT.<sup>1</sup>

August 3 and 5, 1852.

*Will—Construction—An illegitimate Child held entitled to a Share as one of a designated number of "Children."*

A testator recited in his will that he had nine children, whom he named and described, and he bequeathed the income of his estate to his wife for life; and, after her death, the capital to be divided among his children by his wife then living, and the issue of them who should be then dead. Various other trusts were declared by the will, and among them that the trustees should pay the interest during the life of such of his "said children" as should be a daughter in a particular manner. One of the daughters was illegitimate:—

*Held*, (Lord Cranworth laying great stress on the latter clause, but the Lord Chief Justice considering the will sufficient without it,) that the intention of the testator was on the will manifest that the illegitimate daughter should take a share with the legitimate children.

There is no inflexible general rule that illegitimate children cannot participate in a gift to children.

ROBERT WRIGHTSON, by his will, dated the 24th of September, 1836, reciting that his two daughters, by his first wife, were amply provided for by him on their respective marriages; and reciting that he, the testator, had nine children then living, by his present wife, namely, Eliza, the wife of R. B. O.; Charlotte, the wife of W. R.; Harriett, the wife of J. E. J.; Mary Ann Wrightson; Maria, the wife of S. P.; Robert Wrightson, his eldest son; George B. Wrightson, his second son; Caroline Wrightson; and Charles Frederick Wrightson, his

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 860; 16 Jur. 877.

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youngest son; and reciting that, on the respective marriages of his four married daughters, by his present wife, he had advanced to them sums of money, amounting together to 560*l.* each; and that it was his intention to make similar provisions for his two unmarried daughters, bequeathed the sum of 1,120*l.* to trustees, upon trust, to divide the same into two equal shares, one of such shares to be allotted to each of his said two unmarried daughters, and to be held upon the like trusts for the benefit of each daughter, as were declared thereafter concerning the share which should be allotted to them in the proceeds of the sale of his real estate, and in leasehold lands thereafter devised and bequeathed, and the stocks, funds, and securities thereof, in case she were living, on the decease or second marriage of the testator's said wife. The testator, then, after giving legacies to his sons, bequeathed the residue of all his personal estate whatsoever and wheresoever (except leasehold lands and tenements) to his wife absolutely; and then devised and bequeathed all his real estate, and all his leasehold messuages or tenements, lands, and hereditaments, to the trustees before named, their heirs, executors, administrators and assigns, respectively, upon trust, on the decease of his said wife, or in her lifetime, with her consent in writing, absolutely to sell the whole, or any such real and leasehold estates, and to invest the proceeds of such sale or sales in the parliamentary stocks or public funds of Great Britain, or at interest in government or real securities in England or Wales; and upon further trust to permit and suffer his said wife, Charlotte Wrightson, to receive the rents and profits, interest and dividends, and annual produce of his said real estate and leasehold lands, and trust moneys and securities, during such time as she should continue his widow; but, if she should marry again, then upon trust, after such marriage, and during the remainder of her life, with and out of such rents, issues, and profits, to pay her an annuity of 50*l.* to her separate use, free from anticipation. The testator then declared as follows: "And from and after the decease or marriage of my said wife, but subject and without prejudice to the trusts and purpose aforesaid, the said trustees or trustee for the time being, do and shall divide the principal of the said trust moneys, stocks, funds, and securities between all and every my children by my said present wife, who shall be living at the time of her decease or second marriage, and the issue of such as shall have departed this life, leaving issue then living, such issue taking *per stirpes*, and not *per capita*, as tenants in common, and their respective executors, administrators and assigns, subject, nevertheless, as to the shares of daughters, to the directions hereinafter contained. [And I do hereby direct that my said trustees or trustee shall, during the life of each of my said children by my present wife who shall happen to be a daughter, pay the dividends, interest, and annual proceeds of her share of the said stocks, funds, and securities, trust-money, and premises, unto such person or persons, for such purposes, and in such manner only as such daughter, whether covert or sole, shall, from time to time, by any writing signed by her, appoint, but not so as to deprive herself, while under coverture, of the benefit thereof by anticipation; and in default of such appointment,

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and subject thereto, into the hands of such daughter, for her sole and separate use, exclusively of any husband with whom she may marry, and so that her receipts shall be sufficient discharges for the same,] and from and after the decease of each and every of such daughters, then upon the trusts hereinafter mentioned, for the benefit of the children of such daughter, and in default of issue of such daughters, then in trust for such person or persons, and for such purposes as such daughters shall by will appoint; and in default of appointment upon the following trusts, namely, upon trust for the brothers and sisters of the whole blood of such daughter then living, equally, and the issue of any brother or sister of the whole blood who may have died, leaving issue then living (such issue taking *per stirpes*, and not *per capita*) as tenants in common, and their respective executors, administrators and assigns; and in default of any brother or sister of the whole blood, or the issue of any such brother or sister, then upon trust for such person or persons as, at the time of the decease of such daughter, shall be her next of kin, under and according to the statute made for the distribution of intestate's effects."

The testator had by his wife only the nine children enumerated by him, the daughter Eliza, the wife of R. B. O., being, however, illegitimate, having been born by the testator's wife to him before their marriage. The time for the division of the produce of the sale having arrived, the facts were embodied in a special case; and it was set down before the Vice-Chancellor Turner, but was transferred by leave to their lordships' paper, and now came on to be heard. It appeared that, by some inadvertence, the passage in the will within brackets was omitted in the case, and was only discovered on the production of the probate in court.

*W. R. A. Boyle* appeared for the illegitimate daughter. Admitting the general rule that by "children" only "legitimate children" can be considered as intended, there being persons who can satisfy the term "children," still, where a testator has furnished on the face of his will a means of interpreting his meaning, the court will so interpret his expressions as to admit an illegitimate child to participate in the benefits of the bequest made to children generally. In the first place, here the testator enumerates his nine children by name, this lady being among them. Again, he speaks of his children by his present wife: that lady was his child by his present wife. Again he refers to his children as his "said" children, and again he refers to his daughters as his "said daughters." He cited the following cases: *Metham v. The Duke of Devon*, 1 P. Wms. 529; *Beachcroft v. Beachcroft*, 1 Madd. 430; *Bayley v. Snelham*, 1 Sim. & S. 78; s. c. 1 Law J. Rep. Chanc. 35; *Gill v. Shelley*, 2 Russ. & M. 336; s. c. 9 Law J. Rep. Chanc. 68; *Meredith v. Farr*, 2 You. & Col. C. C. 525; *Evans v. Davies*, 7 Hare, 498; s. c. 18 Law J. Rep. (N. S.) Chanc. 180.

*Waley*, for the trustees, submitted the question to the court to show that the authorities were not all one way, and drew attention to the cases of — *Bagley v. Mollard*, 1 Russ. & M. 581; s. c. 8 Law J. Rep.



Chanc. 145; *Wilkinson v. Adams*, 1 Ves. & B. 422; *Fraser v. Pigott*, You. 354, from which two propositions could be deduced: first, that illegitimate children could only take as *personæ designatæ*, and not as a class; and, secondly, that illegitimate children could not take as a class along with legitimate children.

LORD CRANWORTH, L. J. This case has been well argued by the learned counsel; but with all respect to them, I think that a very material passage in the will, to which my attention has been called by my learned brother, has not been touched upon in the argument, nor even set forth in the special case. But for that, I was on the point of differing from my learned brother as to the construction to be put upon this will. The grounds of the conclusion I had come to I shall state. I reject the notion of there being any rule to the effect that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or bequest to children generally. I think that there is no invariable rule of that sort, but that in each case the question is one which depends upon the circumstances appearing upon the will; and that if, from the whole context of the will, it appears that illegitimate children are to be included with legitimate children in the benefit intended, illegitimate children may take. *Prima facie*, the word "children" means "legitimate children," and it is to be read as if the word "legitimate" were annexed. Therefore, where a will purports to give a benefit amongst children, it is the same thing as if it had said "amongst legitimate children," unless something is disclosed upon the face of the will which shows that that is not meant.

Now, it was said that in this will that something is disclosed, inasmuch as the testator begins by saying, "Whereas I have nine children, namely, Eliza, wife of R. B. Owen; Charlotte, wife of," &c.; and among the nine children thus enumerated, one is illegitimate, and consequently, that the testator, when he speaks of his children, means to designate his daughter Eliza Owen also, who is not legitimate. The question, however, is, whether this recital must of necessity be coupled with the gift afterwards of the real and leasehold estates; for the rule is, legitimate children must be taken to be intended by the word "children," unless the context leads necessarily to the inference that something else was meant. Now, the recital here was for a purpose, namely, as an introduction to, and an explanation of, the gift made immediately afterwards in favor of the testator's two unmarried daughters. After enumerating his children, and distinguishing those daughters that were married, the testator goes on to recite his intention to make a provision for each of his two unmarried daughters equal to that which he had previously made upon each married daughter upon her marriage. This provision he then makes, and he then proceeds to give and devise his real estate and leasehold estate in the manner stated in the special case. Now, I must own, that had the will stopped there, I should have thought that legitimate children, and legitimate children only, were intended; for I cannot see that there would, in that case, have been an absolute necessity to construe the word "children" otherwise than according to its natural import.

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In some of the cases cited, it was thought impossible to construe the word according to its natural import, as in the case of *Gill v. Shelley*, where the gift was to the children of a deceased person, who had died leaving only two children, of whom one was legitimate and the other illegitimate. There it was held, that the illegitimate child was intended to be included, otherwise it was impossible to give a meaning to the word "children," which was in the plural. So, also, where the gift is to the "children" of a deceased person, who at his death left none but illegitimate children, and there the illegitimate children are supposed to be intended, for otherwise there would be nothing for the will to operate upon. The principle upon which Sir John Leach acted in *Bagley v. Mollard* is, I think, the right one. There the testator bequeathed a leasehold house in trust for Elizabeth Mollard, whom he described as the then only surviving child of his son William Mollard, and concluded his will by a residuary bequest to all and every the children of his sons James Mollard and William Mollard, and of his daughter Mary Bagley. Elizabeth Mollard, the grandchild, being illegitimate, the question was, whether she was entitled to share in the residuary gift. Sir John Leach held she was not, on the principle that whenever it was possible for the general description of children to include legitimate children, it could not also be extended to illegitimate children.

Upon that principle, I should have come to the same conclusion here, but for a passage in the will to which my attention has been called, as I have said, by my learned brother, namely, the passage in which the testator says, "And I do hereby direct that my said trustees or trustee shall, during the life of each of my said children by my present wife, who shall happen to be a daughter," dispose of the interest of her share, &c., in the way mentioned in the will. Coupling that passage with the passage which precedes it, and in which the testator enumerates by name his children by his present wife, I am of opinion that by the words "children by my present wife" he must be taken to have meant all those whom he had previously enumerated as his children.

KNIGHT BRUCE, L. J. The passage upon which so much stress has been laid by my learned brother is not stated in the abstract of the will as set forth in the special case, but was discovered only on my referring to the probate of the will. It will be necessary, therefore, that the probate should be entered. It is important that it should be so, because Lord Cranworth has laid so much stress upon the passage in question. He is, I need not say, probably right; but, for myself, I confess, I should have thought the intention of the testator sufficiently apparent without the aid of those words. I think that, consistently with the whole of the authorities cited, except, perhaps, the case of *Bagley v. Mollard*, this case may be decided according to the plain intention of the testator. The result is, that the illegitimate daughter and her children are entitled to a share in the proceeds of the real estate.

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Bodenham v. Hoskins.

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BODENHAM v. HOSKINS.<sup>1</sup>

June 10, 1852.

*Receiver — Bankers' Liability — Separate Accounts.*

The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn he transferred the balance of the estate account to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff, against the bankers, to refund this balance so transferred, it was held — that, according to the principles of a court of equity, a person who deals with another knowing him to have in his hands, or under his control, moneys belonging to a third person, must not enter into a transaction with him, the effect of which is that a fraud is committed on the third person; and it appearing upon the evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate, a decree was made against the bankers, for repayment of the amount.

THE bill stated that the plaintiff was the owner of an estate called "The Rotherwas estate," in Hereford, producing a rental amounting to between 5,000*l.* and 6,000*l.*; that previously to the year 1846, the plaintiff had employed Mr. Charles Blount, a solicitor, residing in Hereford, as his receiver and agent, to collect the rents of the Rotherwas estate; that in the year 1846, the said Mr. Blount sold his business to Thomas William Parkes, also a solicitor, and the plaintiff, thereupon, appointed him to be the receiver of his said estate, in lieu of Mr. Blount; that the said C. Blount and T. W. Parkes, and afterwards the said T. W. Parkes alone, kept a banking account with the defendants, Messrs. Hoskins, Morgan & Hamp, bankers, of Hereford; that in the month of June, 1846, the said T. W. Parkes had an interview with Mr. Hamp, at the bank, and requested liberty to overdraw his account, to the extent of 1,500*l.*, to meet certain liabilities, which was agreed to; but at such interview the said Mr. Hamp inquired of the said T. W. Parkes whether he was not the agent of the plaintiff for collecting the rents of the Rotherwas estate, and upon being informed that he was, and being told what was the amount of the rents, the said Mr. Hamp requested Parkes to open an account with the bank for the receipt of such rents, saying that if the accommodation required by Parkes was granted, he might, in return, do something for them; that Parkes agreed to open the proposed account, and stated that he believed the average balance in respect of these rents would be about 1,000*l.*; that in pursuance of the liberty granted to Parkes, he drew largely on his private account with the bank, and there was a balance against him of 1,037*l.*, or thereabouts; that in October, 1846, the said T. W. Parkes received the sum of 746*l.*, in respect of the half year's rents arising from the Rotherwas estate, which sum he paid into the defendant's bank, and desired that a separate account might be opened for such rents, to be entitled "The Rotherwas Account;" that the defendants then had notice that the Rotherwas account was

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1 16 Jur. 721; 21 Law J. Rep. (N. S.) Chanc. 864.

opened by Parkes, as the receiver and agent of the plaintiff, and that the money placed to that account was the money of the plaintiff, arising from the rents of the Rotherwas estate, and it was then arranged that the words "Rotherwas account" should be written at the foot of every check drawn on such account, as well as at the head of such account in the bank books, for the purpose of distinguishing the said account from any other account kept by Parkes at the said bank; that the said T. W. Parkes, in the month of December, 1846, opened with the defendants, the bankers, a third separate account, called "The General Account," for the moneys of his clients, other than the money of the plaintiff; that Parkes continued to pay into the bank the rents of the Rotherwas estate, and to draw checks when required upon the Rotherwas account; that in the month of July, 1847, the plaintiff was informed that a check drawn by Parkes at the request of the plaintiff for the money owing by him to a person named Pritchard, but which was not drawn on the Rotherwas account, but was drawn generally, had been dishonored at the defendants' bank. That the plaintiff thereupon went to the defendants' bank, and was for the first time informed that all the balance, amounting to 829*l.* 11*s.* 9*d.*, which ought to have been then standing to the credit of the Rotherwas account, had been previously passed or transferred from the Rotherwas account to the credit of the private account of the said T. W. Parkes, at the said bankers, in part to cover a deficiency then existing in the private account of the said Parkes. That at the time of such transfer the said T. W. Parkes was and still continued to be insolvent, and that the defendants, well knowing that the said Parkes was the receiver and agent of the plaintiff, and that the balance remaining due from them on the said Rotherwas account, was the proper money of the plaintiff, arising from the rents of the said Rotherwas estate, and well knowing or having reason to believe that Parkes was insolvent, or in great pecuniary embarrassment, and that he had no means whereby he could, out of his own moneys, discharge the balance due from him to them on his private account, contrived and colluded with Parkes to pass or transfer the said sum of 829*l.* 11*s.* 9*d.*, remaining due from them, to the credit of the said Rotherwas account, so as in part to liquidate or reduce the balance due from him on such "private account." That the plaintiff, by his solicitors, applied to the defendants, and requested them to account for and pay to the plaintiff the said sum of 829*l.* 11*s.* 9*d.*, which, but for the collusion and contrivance of the defendants and Parkes, would be now remaining due from them, on the credit of the Rotherwas account; but the defendants refused to comply with the plaintiff's request, on the ground that at the time when Parkes, as the receiver of the plaintiff, opened with the defendants the Rotherwas account, it was arranged and agreed, between the defendants and Parkes, that the said several accounts kept by him at their bank were to be considered as one account, and that, consequently, the defendants were at liberty to debit either account for sums overdrawn on the other account or accounts.

The bill contained charges, to the effect that the defendants well knew that Parkes was the agent of the plaintiff, and that the money

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paid in by him to the Rotherwas account, was money belonging to the plaintiff. That the defendants, well knowing that Parkes was in insolvent circumstances, repeatedly urged him to transfer the balance due upon the Rotherwas account to his own private account, in order to reduce the debt due from him to the defendants, and that, in consequence of such applications, Parkes did, on the 7th of July, 1847, sign a memorandum, in a minute book of the defendants, to the following effect:—"The three accounts to be brought into one, and checks for the transfer of the balance shall be sent forthwith to the bank account; to be overdrawn 1,000*l.* as a maximum debtor balance, and, by the 7th of November, the credit to be reduced 500*l.* and, on the 31st of December, the account to be cleared; a discount, to the extent of 200*l.* or 300*l.*, to be given if desired. Signed, T. W. Parkes." That, in the same month of July, Parkes drew a check for the sum of 829*l.* 11*s.* 9*d.* on the Rotherwas account, and which, by agreement with the defendants, he did on the same day pay into the bank, to the credit of his own private account. That the plaintiff, on several occasions being in want of money, and it not being convenient for him, on such occasions, to apply to T. W. Parkes, and in his absence, and without his knowledge or privity, drew and signed, in his own name, checks for certain sums of money on the "Rotherwas account;" and that, on other occasions, during the temporary absence of Parkes from Hereford, the plaintiff obtained money from the defendants' bank upon checks drawn at the suggestion of the defendants themselves, by the clerk to Parkes, and indorsed by the plaintiff in his own name, which money was thereupon debited to the Rotherwas account.

The bill prayed that the transfer or paying of the said sum of 829*l.* 11*s.* 9*d.* from the Rotherwas account to the private account of Parkes, might, under the circumstances, be declared fraudulent and void, and that the defendants might be directed to pay to the plaintiff the said sum, or such sum as, but for the acts of the defendants, would now be the balance remaining due from the said bankers, at the credit of the said "Rotherwas account."

The answer of the defendants was to the following effect: that the said T. W. Parkes directed his banking account to be kept with three distinguishing heads, one of which accounts was the Rotherwas account; but that the said Parkes expressly stated that, although kept and distinguished under three heads, yet as to debits and credits arising on them between him and the said bankers they were, in fact, to be regarded by the said bank as one account only; and it was expressly stipulated that the defendants were to be at liberty to consolidate the said three accounts, and that they were not in any manner to be prejudiced by the said accounts being kept separate, or distinguished separately, such distinguishing modes of keeping the accounts being required at the particular request of Parkes, and for his sole accommodation. That during the whole of the time when the stipulations and agreements as to the banking accounts of Parkes were being made, the plaintiff's name was never mentioned or alluded to, nor had they any notice or knowledge that the plaintiff had any control over either of the accounts, nor were they aware that the money

placed in the bank by Parkes to the Rotherwas account was received by him as agent of the plaintiff. That the transfer of the balance due to Parkes on the Rotherwas account to his own private account, was made at the desire of Parkes himself and not at the suggestion of the defendants. The defendants submitted that under the circumstances they were justified in making such transfer, and that it was a good, legal, and equitable transfer, particularly as the said Parkes reserved to himself the right to draw checks thereon; and he alone paid into the banking house of the defendants all the money which was entered to his credit, and never stated to the defendants that any other person had any right or interest therein, and the name of any other person was never mentioned as connected with the accounts. The defendants alleged that they did not know at the time of the aforesaid transfer of the balance on the Rotherwas account, that Parkes was insolvent; but, on the contrary, they believed he had several thousand pounds coming to him from the partners of his late firm, and they could not state whether he was now insolvent; that the defendants knew Parkes was the solicitor for the plaintiff, and that knowing the plaintiff to be a person of high respectability and standing in the county of Hereford, they had on several occasions paid checks indorsed by him upon the defendants' bank in the absence of Parkes, and had at the plaintiff's request debited the amount of such checks to the Rotherwas account, believing that Parkes would approve of their conduct, as he subsequently did; but these sums of money were paid on the credit of the plaintiff, as a gentleman of wealth and property, and if Parkes had not assented to be debited therewith, they must have looked to the plaintiff alone for payment; and the defendants further stated that they could not set forth whether the plaintiff had drawn any other checks in his own name upon the Rotherwas account.

*Bethell* and *Collins*, for the plaintiff, regretted that the defendants, the bankers, should have allowed themselves to have been drawn into such a suit as this, when they had no legal defence whatever to the plaintiff's claim. The right of the plaintiff depended upon these two propositions, that the money deposited with the bankers by Mr. Parkes and carried to the credit of the Rotherwas account, was so deposited by Parkes as the agent and receiver of the plaintiff, and that the bankers knew the money to have been placed in the bank by Mr. Parkes to that account as a receivership account, separate from his private account. If these two propositions were made out upon the evidence, to the satisfaction of the court, the bankers had no defence. In permitting the money to be transferred from the receivership account, the bankers were colluding with the receiver to enable him to defraud his employer, and the employer was at liberty to follow the money into the hands of the bankers, and could maintain against them the same claim which he had against the receiver or agent. The evidence of the plaintiff clearly established both these propositions, and there was nothing in the evidence of the defendants to contradict it. The three accounts kept at the bankers of Parkes were separate accounts, and the bankers perfectly well knew that the

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money paid in to the Rotherwas account was the money of the plaintiff. The separate heading to the different accounts was used expressly to show that the money was appropriated to particular purposes and distinct from the private account of the individual. The principle acted upon by this court was, that if money was deposited with a banker in separate accounts, and the banker knew the money received upon one account was the property of any other person than his customer, he had no right to allow the blending of the two accounts. This principle arose upon the universal maxim of common honesty, that if you know the person with whom you are dealing is applying for your benefit money belonging to another, you are in point of fact, auxiliary to that person committing a wrong upon another.

*Stuart and Wright*, for the defendants, contended that there was no fiduciary relation existing between the bankers and the plaintiff, and there was no fiduciary relation between the bankers and their customer. The bankers received the money of Parkes, which he desired should be kept in three separate accounts; but he had full power to control his own accounts, and if he thought fit to draw the money from one account and place it to another, the bankers had no power to prevent him from doing so. The three accounts were, in fact, treated as one account; and it was not proved that the bankers knew that the money paid in by Parkes to the Rotherwas account was belonging to the plaintiff; but if they did, there was no reason why they should prevent Parkes from drawing it out, and applying it in any manner he chose.

The following cases were cited, — *M'Leod v. Drummond*, 14 Ves. 353; *Scott v. Tyler*, 2 Bro. C. C. 431; *Hill v. Simpson*, 7 Ves. 152; *Foley v. Hill*, 1 Phill. 399; s. c. 13 Law J. Rep. (N. S.) Chanc. 182.

KINDERSLEY, V. C. The doubt that has from time to time crossed my mind in this case was chiefly this, whether the facts were stated in the pleadings with that degree of particularity as that I could say there had been a full opportunity for the defendants to meet those allegations of fact by the evidence which they might be able to adduce. Now that I have become more acquainted with what is contained in the pleadings, I feel myself in a condition, without waiting to look through the pleadings more in detail, to express my opinion in this case. I will first consider the case as between the plaintiff and Parkes; that is, what was the state of things as between the plaintiff and Parkes in the course of these transactions; and then consider what was the relation of the defendants, the bankers, towards Parkes in the matter; and how far the plaintiff, upon that state of things, is entitled to the decree which he asks against those defendants.

Now, as between the plaintiff and Parkes the matter seems to have stood thus: — the plaintiff was the owner of this Rotherwas estate, (a considerable property in the neighborhood of Hereford,) and it seems that he had employed, as his solicitor and his agent and re-

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ceiver, a gentleman of the name of Blount. Mr. Blount, being about to give up his employment, sold his business or transferred it to Mr. Parkes, who had been previously a solicitor in London; and it was arranged between Parkes and Blount that, for six months, Parkes should use the name of Blount, and accordingly an account was opened by Parkes, with the concurrence of Blount, with these bankers, in the joint names of Blount and Parkes. It was intended that that should not continue more than six months. When that account ceased, in short, when Parkes was to use his own name exclusively in the matter, or shortly after that period, he was employed by the plaintiff as his solicitor, succeeding Blount in that employment, and shortly after that period again (all within the period of a very few months, or even weeks) Parkes was employed by the plaintiff as his receiver and agent in respect of the Rotherwas estate, apparently in the same manner as Blount had been employed before. Parkes having on the occasion of the ceasing of the account, — the putting an end to the joint account in the names of Blount and Parkes with the bankers, — opened a private account of his own on the 23d of June, 1846. When he came to be appointed the receiver of the rents and profits of the Rotherwas estate by the plaintiff, he very properly, as it appears to me, opened another account with the bankers for the purpose of placing to the credit of that account with the bankers the sums which he might receive in respect of the rents and profits of the Rotherwas estate, and drawing from the account the sums which he might have to pay, on account of the Rotherwas estate, or which he might have to pay to his employer, the plaintiff. I say that that account was very properly kept separate from his own account, and, at all events, as between the plaintiff and Parkes, that account, although unquestionably it was the account of Parkes, and the bankers were to look to Parkes as the only person entitled to draw upon that account, still, I say, as between the plaintiff and Parkes, that account was opened by Parkes for the purpose of keeping in that form an account of the receipts and payments by Parkes, as receiver in respect of the Rotherwas estate, and Parkes very properly intitled the account as "The Rotherwas Account," which distinctly marked it, at all events as between him and the plaintiff, as being the account of the Rotherwas estate: how far it marked it as between Parkes and the bankers I shall have occasion to refer to presently. I am now, as I have said, considering the case as between the plaintiff and Parkes. With regard to the third account which Parkes opened, the plaintiff had nothing to do with that — I mean that account which is called the "General Account." Now, whatever balance might from time to time be standing to the credit of the Rotherwas account, it is quite clear that, as between the plaintiff and Parkes, Parkes would violate his duty if he applied any part of that balance to any purposes of his own; if, for example, he had drawn out that money and applied it to any purpose of his own, the bankers knowing nothing of the matter; still, as between Parkes and the plaintiff, it would be a gross breach of duty, — a breach of that duty which Parkes owed to the plaintiff, — to apply the moneys which should arise from the Rotherwas estate



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to any other purpose than the purpose of the plaintiff. When, therefore, Parkes drew the check, on the 9th of July, 1847, for the 829*l*. and a fraction, which was then the balance standing to the credit of the Rotherwas account, in order that the amount of that check might go towards the liquidation of the separate account of his own, on which he was debtor, without at present saying how far the bankers were affected by that, as between Parkes and the plaintiff, it was a breach of trust committed by Parkes as against the plaintiff; it was a fraud, in fact, committed upon the plaintiff; it was a misappropriation by Parkes of that which was in fact the money belonging to the plaintiff, to purposes of Parkes, and not to the purposes of the plaintiff: that, I conceive, is beyond all question. The condition of things, and the relation as between Parkes and the plaintiff (and I do not understand that there is any controversy raised on that part of the case), is stated on both sides, and it is admitted on both sides, that, whether or not the bankers have made themselves liable, as far as Parkes is concerned there is a great breach of duty, and it was very justly made a matter of observation on the part of the defendants' counsel that Parkes's own representations were such as to show that he had been guilty of very great misconduct; and from that an argument was drawn, with more or less of weight, that he was not to be believed in the representations of fact which he made; but, at all events, I take it thus far beyond all controversy, that that act of Parkes was a great breach of duty towards the plaintiff, his employer. Now, as the agent or receiver of Mr. Bodenham, the plaintiff, he clearly was, in all senses, a trustee for him; there was a fiduciary character created between the plaintiff and Parkes. I do not know that it is very material whether this be technically called a breach of trust on the part of Parkes; but, at all events, it was a breach of a duty which Parkes owed to the plaintiff, standing towards him in a fiduciary character, in respect to the moneys, as receiver of the Rotherwas estate.

Now, then, I approach the question as to the participation of the bankers in this misconduct of Parkes — how far the bankers (the defendants) were in any way participators in this misconduct of Parkes: participators in the act they were, but it does not follow, because they were participators in the act, that therefore they were participators in the fraud of Mr. Parkes. Let us see, therefore, what was the position of the bankers in the matter. I entirely agree with many of the observations that have been made by the counsel for the defendants, that, as between banker and customer, in a naked case of banker and customer, the banker looks only to the customer, in respect of the account opened in that customer's name, and whatever checks that customer chooses to draw, the banker is to honor. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the moneys are that are paid in to that account, and he is not to inquire for what purpose moneys are drawn out of that account: that is the plain general rule, as between banker and customer. But now let us see whether that naked state of circumstances existed in the present case. Now the first transaction or circumstance that appears as important to note — first, in point of date — appears to be

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the interview which, on the 10th of June, 1846, took place between Parkes and Mr. Hamp (one of the partners) and Spozzi, a clerk or cashier of the bankers. It appears that at this time there was a considerable balance, I think somewhere about 1,200*l.*, to the credit of the joint account, which I have mentioned, had been opened in the names of Blount and Parkes; but the six months during which Parkes was to keep that account open, that is, to use the name of Blount, were nearly expired, and Parkes represented to the bankers, that is, represented to Mr. Hamp and Mr. Spozzi, the cashier, that he would have occasion to draw largely for purposes of his own, and wished to know whether they would honor his checks, that is to say, allow him to overdraw the account which he had with them. One can easily conceive there would be some hesitation in acceding to that proposal, and Mr. Hamp, very fairly, I think, said, "Well, if we are to do this for you, you ought to be doing something for us; we should expect some sort of return of obligation;" and, whether suggested originally by the bankers or offered by Parkes, this at last took place, that Parkes told the bankers that he would introduce to them the Rotherwas account. Now, referring to the statement in the evidence of Parkes upon this part of the case, I find that he represents it thus: after stating what I have already adverted to, which is not precisely material to the present case, the particulars of that account opened in the names of Blount and Parkes, he states this, that when that joint account was closed, the balance standing to the credit of that account was transferred to the credit of his own account which he opened, and which, I should observe, was not opened until some days after this interview. It was on the 26th of June, 1846, that the private account was opened, and the interview I have adverted to was on the 10th, just before the opening of the private account. He speaks of the separate account, and then goes on thus:—"The book now produced, and shown to me at this the time of my examination, marked with the letters A. B., is the pass-book, wherein such private or office account was kept by the said defendants, the bankers." Then he goes on thus:—"Before the said joint account was closed, and on or about the 10th of June, 1846, while there was a balance to the credit of the said joint account of 1,337*l.*, or thereabouts, I had an interview at the defendants' banking house, with the defendant, Francis Hamp, and Mr. Spozzi, the cashier of the bank, touching certain pecuniary engagements to persons in London, which I was about to be called upon to meet. The six months during which I was entitled to use the name of the said Charles Blount had then nearly elapsed, and it was consequently in contemplation to close the said joint account, and open a separate account. The object of that interview was to obtain leave from the defendants, the bankers, to overdraw my account from them, from time to time, as might be necessary, to the extent of about 1,500*l.*, for the purpose chiefly of making certain payments in London, and also, temporarily, the expenses of my business in Hereford. On my making the application in question, the said Francis Hamp, in the presence of Mr. Spozzi, said, that he and the said Nathaniel Morgan," the two partners, "would assent to it, and that they would

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communicate with the said K. Hoskins, who would, no doubt, also concur in it;" those are the three partners. "In the course of the interview, the said Francis Hamp said to me, 'I understand, from Mr. Spozzi, that you intend to introduce the Rotherwas account; you ought to do something for us if we help you.' " I confess, it does appear to me, that the use of the word "introduce" there, which occurs more than once, is important. It is evidently not the splitting of a preëxisting account for the mere convenience of the individual keeping the account. It was a holding out to the bankers, or a conception on the part of the bankers that there was held out to them, the introduction to them, that is, the opening with them, of some account which would be for their benefit.

Now, whether the benefit they were to derive from that was a benefit merely of having an additional customer, at least an additional account on which there would generally be some balance (which is always to the advantage of the banker), or whether they contemplated something beyond that, namely, that, allowing Parkes to overdraw his own account, they might appropriate the balance which might be to the credit of the Rotherwas account, to protect themselves against the loss of such balance: whatever was the view which they had, this, at all events, appears to me to be clear in this transaction, that the question of the opening of this Rotherwas account was mooted on this 10th of June, as the introduction to them of some account, which was to be doing something for the bankers, as the bankers were doing something for Parkes: that is, for the benefit of the bankers. Well, the witness goes on in this way: "I said that I did intend to introduce that account when I became the plaintiff's receiver; and the said Francis Hamp then asked me two or three questions as to the rental of the Rotherwas estate and the balance that would probably be kept on the account. I told him the rental was about 6,000*l.* a year, and the balance I would keep as large as I could: that it would probably average about 1,000*l.* He then said that he was satisfied. The arrangements then entered into between the said Francis Hamp on behalf of the defendants, the bankers, and myself, was undoubtedly that I should be allowed to overdraw my said separate account when the same was opened, if I would introduce to the bank, the account of the rents of the said Rotherwas estate so soon as, under my arrangements with the said Charles Blount, I became the receiver thereof. I did certainly promise the said Francis Hamp, or lead him to understand, that on my becoming such receiver I would open the last-mentioned account at the banking house of the defendants."

Now, when the evidence was read I had not heard the pleadings; and I confess I was in some doubt, especially when I came to the evidence of the defendants and found there was no evidence given on the subject of the interview in any way contradicting this, whether the matter had been so alleged in the pleadings, as to give the defendants an opportunity of meeting it, in which case I certainly should not have come to a decision without further inquiry, either by means of an issue or referring it to the Master on the facts. But I find in

substance — perhaps a little more strongly put — the same statement is contained in the bill, as to what took place on the 10th of June; and when I come to the evidence given by Spozzi, who is here alleged to have been present during this interview, I do not find that Mr. Spozzi makes any attempt, or that any question is put, with a view to his making an attempt, to say that Mr. Parkes is not to be believed on his oath; he is a man who by his own showing has been guilty of misconduct; but I see no reason, I confess, for disbelieving Parkes. I accede to the suggestion that Parkes is to be looked at with great jealousy; and if I found that Parkes positively swore one way and Spozzi positively swore the contrary, I confess I should be much more disposed to put confidence in what Mr. Spozzi stated than what Parkes stated, for the very reason that has been stated, that Parkes has been guilty of misconduct in the matter. But when I find, of the two persons present during that transaction, when both sides have the opportunity of examining each other, or of each examining both, or cross-examining if they please; when I find that one is called upon to state what took place according to his view, and the other is not called upon to state it, and when the interrogatories abstain from giving him the opportunity of stating it, I do consider myself bound to believe the witness on his oath, and I see no reason for disbelieving him.

Now it does not stand only on the evidence of Parkes; for, although Parkes and Spozzi were the only persons present at that interview, except Hamp (who could not of course be examined as a witness), we find this corroboration, not of all the details of what is stated to have passed at this interview, but this corroboration of the substance of it, which goes to show that the bankers knew that this was a receivership account, in respect of the rents and profits; we find on the 26th of October, 1846, when the Rotherwas account was actually opened, another person intervenes, who is examined as a witness, for the previous act of opening the account was not by Parkes himself going to the bankers, but by sending Mr. Ward, his clerk. Now let us see what Mr. Ward states to have passed between him and the bankers on that occasion. Mr. Ward states — and I have not heard a word of suggestion that Mr. Ward is not to be believed — in answer to the twentieth interrogatory, after stating that he was in the employ of Parkes as his clerk and book-keeper, he says, “I was directed by Mr. Parkes, in the month of October, 1846, to open an account with the house of Messrs. Hoskins & Co., of Hereford, bankers, which was then composed of Kedgewin Hoskins, Nathaniel Morgan, Francis Hamp (since deceased), and Joseph Morgan (who are named as defendants in the title to these interrogatories), for him, Mr. Parkes, in the name of the Rotherwas Estate Account. I accordingly attended at the bank of Messrs. Hoskins & Co., in Hereford, on the 26th of October, 1846, and opened the said account, and paid to the credit of it, the sum of 700*l*. I saw Mr. Spozzi, the then manager of the bank, on that occasion, and addressed myself to him; but, to the best of my recollection, the defendant, Joseph Morgan, was in the bank and near enough to hear what passed between Mr. Spozzi and me. I

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stated to Mr. Spozzi on the last-mentioned occasion, by Mr. Parkes's directions, that the said account was to be opened under the title of the Rotherwas Estate Account, and that the checks which he, Parkes, would draw upon it would be so indorsed, as the money which would be paid in to the said account belonged to Mr. Bodenham (meaning Charles Thomas Bodenham, the plaintiff in this suit), and that he, Mr. Parkes, wished it to be kept separate from the other account which he had with the bank. The sum of 700*l.* which I paid in to the credit of the said account consisted of rents arising from the Rotherwas estate, which had been just received by Mr. Parkes and belonged to the plaintiff, and was to the best of my recollection chiefly composed of country bank notes." Mr. Parkes had at that time another account with the bank, entitled "Office Account," and which related to his business as a solicitor, and in the ensuing month of December he opened a third account, which is not material to the present case. Nothing can be more precise and clear than this, that Parkes, having sworn that on the 10th of June he had promised to introduce the Rotherwas account to these bankers as soon as he was appointed receiver, according to his arrangement with Blount, his predecessor, whatever doubt might exist as to whether Parkes accurately stated the truth when he stated that he then represented to the bankers that this was a receivership account, for the purpose of keeping the account of the Rotherwas rents, and so forth, — whatever doubt, I say, might exist on Parkes's evidence, as to whether the bankers knew the nature of the account, and that in point of fact it was Bodenham's account, not his account, in the sense that Bodenham was to draw on it, but that the moneys belonged to the estate of Bodenham, and that it was the account of Bodenham's receiver, — whatever doubt might exist on Parkes's evidence, here is Mr. Ward's evidence, showing, that when the account was opened, at the moment when the very first sum was paid in to the credit of that account, the bankers were distinctly informed of the reason why it was kept as a separate account, why the checks were to be entitled with the words, "The Rotherwas Account." The reason was, because the moneys which had been paid in to that account, belonged to Mr. Bodenham, the plaintiff. It appears to me beyond all question, therefore, that from the very commencement of that account, the bankers knew that the money paid in to that account were the moneys of Mr. Bodenham, arising from the rents and profits of his Rotherwas estate, and that the account was kept by Parkes, not as an account of his own, in relation to his own moneys which belonged to himself, but in his character of receiver to Mr. Bodenham's Rotherwas estate.

Now, whether the bankers in their own minds, or even in their own books, if the fact had been so, treated the Rotherwas account as if it had been the private account of Mr. Parkes, the question is, whether they had a right to do so; whether they had a right to say, — knowing from the facts that the money placed to that account was Mr. Bodenham's money, and that any balance standing to the credit of that account at any time was Mr. Bodenham's balance, — that they could make such an arrangement with Mr. Parkes, as that at any time

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they should be at liberty to appropriate the balance to the credit of that account, towards the liquidation of the balance standing to the debit of the private account of Mr. Parkes. It appears to me that, on every principle of equity, they had no right to do so; it appears to me that it is not a question whether simply, at the time when the check was drawn for the 829*l*., they had a right then to allow that check to be placed to the credit of the other account; but whether they had a right ever to make an arrangement with Parkes to that effect; whether they had a right to say that the receiver should so deal with them as to make his principal's money at any time liable to be appropriated to discharge the private debts of the receiver to the bankers. I am quite satisfied that upon all principles of equity that could never be done; and this case illustrates what has often struck me as a very remarkable view of the principles of equity, that almost all the principles which are acted upon by a court of equity, in point of fact, are pervaded by a higher, and purer, and more exalted tone of morality than that which prevails among mankind, even among the moral portion of mankind; and I wish it to be understood that I do not think there is to be imputed to these gentlemen any design of doing that which in their minds was dishonest or improper. I believe they had no such intention. All, I think, that I can impute to them is, that they were not aware that, according to the principles — the moral principles — of a court of equity, and acted upon daily by a court of equity, a person who deals with another, which other he knows to have in his hands, or under his control, moneys belonging to a third person, cannot deal with the individual holding those moneys for his own private benefit, when the effect of that transaction is, that that person commits a fraud on a third person. That Parkes was committing a fraud in appropriating to his own purpose the money of his employer, is beyond question. The bankers did not seem to feel or be aware that they had no right, and that Parkes had no right, to enter into any arrangement, the effect of which was to make the money (although Parkes was the only person who could draw on that particular account) liable to any defalcation, any deficiency that might exist upon the private account of Mr. Parkes with the bankers.

Now, I do not know that in the view which I take of this case, it is necessary to consider what the bankers, from time to time in the course of the transaction, considered to be the state of circumstances. The two witnesses, Messrs. Spozzi & Fryer, labor very much, or rather the interrogatories have labored, to bring them over and over again to repeat this, particularly the deposition which is in answer to the twenty-sixth interrogatory, that Bodenham, the plaintiff, never told them that these were his moneys; that Bodenham, the plaintiff, never told them that this was his account; that Bodenham, the plaintiff, never claimed to have any control over that account, and so on: that is not the question. Again, it appears to me immaterial to consider whether their suggestion is well founded, that the bankers, at the time the account was settled, treated the three accounts as the accounts of one single customer. If it were necessary to consider what is meant

by that deposition, I confess I am at a loss to know what was in the mind of the witnesses, when they so deposed; for the deposition amounts to this, that when the account was settled the bankers treated and acted upon the three accounts, as the accounts of one single customer. Now, that led me to suppose that, when I came to look at the books, I should find that when the accounts were settled (which appears to have been done half-yearly or yearly), there was an amalgamation of the balances of these three accounts, to see what the result of the three would be. But so far from that, there is never anything of the kind in the books. If, by the term "the time of settling the accounts," they mean the 9th of July, 1847 when two of the accounts were closed, even then the accounts are never treated as one and the same account, or the account of one customer, any further than this, that by arrangement between them and Parkes, the balance appearing to the credit of each of the two accounts, was carried to the credit of the other account (the private account), on which there was a debit; but in no other sense, at the time of settling the account, did the bankers treat and act upon the three accounts, as the account of one and the same customer. If it be meant that the accounts were kept in the name of the same individual, then it is perfectly true; but it is a strange mode of putting the proposition, namely, for the purpose of alleging that the accounts were headed in the name of Parkes, to put it in this shape, to say that the bankers, at the time of settling the accounts, treated and acted on the three accounts as one. It appears to me to be really immaterial what view the bankers took of it, between the time when the Rotherwas account was opened and the 9th of July, 1847, when the balance of that account was transferred to the credit of the private account; because I find at the very opening of the account, nay, some months, three months at least, before the opening of that account, the bankers were well aware that that account was the account of Mr. Parkes, as receiver of the Rotherwas estate; and that the moneys which were to be paid in to the credit of the account, were the moneys of Mr. Bodenham, and that it was for these very reasons that that account was to be kept as a separate account, and so headed.

I am constrained to arrive at the conclusion that the bankers, although I must exonerate them from any deliberate intention to commit a robbery or commit a fraud, still were not only parties to the simple fact of the transfer, but were parties to the fraud in question, in this sense that they were aware of the circumstances which made it a fraud in Parkes, to make the transfer to his private account, and being cognizant of that, and having been cognizant of it before the time when the account was opened under the name of "The Rotherwas Account," and being cognizant of it throughout, they concur in a transaction, the effect of which is, that for their own pecuniary benefit an act is done by Parkes which is a fraud upon the plaintiff. Now, according to the plain principles of a court of equity, such an act never can be sustained; a party cannot retain the benefit which he has obtained from being a party to such an act, with such knowledge of the nature of the act.

I am, therefore, under the necessity of decreeing the repayment of

*In re Magdalen Land Charity.*

the 829l. 11s. 9d. by the defendants, the bankers, to the plaintiff. With respect to the question of interest, it appears to me that I cannot give any higher interest than the interest which the bankers allowed upon the account. If there had been no interest allowed, I do not think I could give any interest at all; but considering that this was transferring to the detriment of Mr. Bodenham, from an account which was yielding interest, a sum of money which if it had still stood there would be bearing interest, I think it ought to be with interest, at the same rate at which the interest was allowed by the bankers.

*In re MAGDALEN LAND CHARITY.<sup>1</sup>*

March 27, 1852.

*Charity—Information—Petition—Sir Samuel Romilly's Act.*

A claim to participate in charity funds, which had been appropriated for 240 years to certain parishes, ought to be brought before the court by information and not by petition, under Sir Samuel Romilly's Act (52 Geo. 3, c. 101).

THIS was a petition of the churchwardens of St. Clement's and All Saints', in Hastings, stating that certain lands had become vested in the mayor, jurats, and commonalty of Hastings, in the reign of Queen Elizabeth; that there was not any deed or instrument declaring uses of the lands; that the proceeds had been distributed yearly at Easter and Christmas for 240 years, by the petitioners' predecessors in office, amongst the poor of their respective parishes; that new trustees had been appointed in 1836, under the Municipal Corporations Act; and that by an order of the court, made in January last, on the petition of certain parishioners of other parishes within the liberties, but not within the town and port of Hastings, and which petition had been served upon and was not opposed by the trustees of the charity property, but had not been served on the present petitioners, it was referred to the Master to inquire what parishes were within the town and port of Hastings, how the income had been applied, and to settle a scheme. The petition prayed that the above order should be discharged.

It appeared that a memorial had been made by the corporation of Hastings, in 1812, under the 52 Geo. 3, c. 102, stating that the poor of the town and port of Hastings were entitled to the charity property.

*W. P. Wood and Pitman*, appeared for the present petitioners.

*Baily*, for the former petitioners.

<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 874.



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*Ex parte Woolmer; In re The Direct Exeter, Plymouth and Devonport R. Co.*

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*Welch*, for the trustees of the charity; and

*W. M. James*, for the Attorney-General.

TURNER, V. C. I think that after the funds of the charity have been distributed, for so long a period among the poor of two parishes, if a claim is set up by the poor of other parishes, the case is not one to be decided under Sir Samuel Romilly's Act, and that in the case of an adverse claim, the Attorney-General must be a party to the proceedings. The only evidence that the corporation were trustees for the poor of the town and port of Hastings appears to be the memorial made in 1812, and that document may admit of explanation if the case be brought before the court upon an information, stating that the corporation had distributed the funds among the two parishes only, and contending upon that memorial that the two parishes within the town and port of Hastings are not entitled to the fund exclusive of the other parishes within the liberties. The order made on the former petition must be discharged, as it has been made adversely to the petitioners without their having been served with the petition. If the parties think that nothing can be added to the facts before me, I have no objection to state my opinion, that on the evidence which has been produced, the property has been applied for so long a period to the poor of the two parishes mentioned in the petition, they alone are entitled to it.

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*Ex parte WOOLMER AND OTHERS; In re THE DIRECT EXETER,  
PLYMOUTH AND DEVONPORT RAILWAY COMPANY.*<sup>1</sup>

July 20 and 26, 1852.

*Company — Winding-up Acts — Appeal from Order for Winding up  
and for Calls for Expenses.*

Seven persons were elected the managing committee of a company, and performed acts in that character. The scheme proved abortive. Actions were brought against one of the seven, and he obtained an order for winding up the company. Others of the seven had made a similar attempt, but were not in time to do so before the order was actually obtained. An official manager was appointed, and the order was prosecuted with the concurrence of all seven. Four of the seven appealed from the order for winding up, and also from an order for a call to pay the costs and expenses and the debt; but it was held, first, that whether the order for winding up were rightly or wrongly made, the four could not move to discharge it; and, secondly, that the order for the call was properly made on the seven members of the managing committee.

THE above-named abortive company was started by persons who denominated themselves "the provisional committee," and they provisionally registered the association, and afterwards called a meeting of the committee, on the 7th of October, 1845, at which thirty-one

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 888.

*Ex parte Woolmer; In re The Direct Exeter, Plymouth and Devonport R. Co.*

persons attended, and out of them seven, namely, Mr. Woolmer, Mr. Bastard, Major D'Urban, Col. Ellis, Mr. Kingdon, Mr. Salter, and Mr. Tanner, were elected the committee of management. That body opened a banking account, appointed engineers, surveyors, and solicitors; and under their direction the line was surveyed; they published the parliamentary notices, and did other acts. They allotted shares in December, and no deposits being paid, the scheme was abandoned in January following. Several of the creditors of the company brought actions in 1848 against Col. Ellis, and among these actions was one by Mr. Floud, the solicitor of the company, for 1,508*l.* Some of the members of the managing committee intended and (on the evidence) endeavored to obtain an order for winding up the company, but Col. Ellis anticipated them, and obtained such an order on the 8th of June, 1849, and the order was served on Mr. Salter, one of the seven. Mr. Sandeman was appointed official manager on the 10th of July, the appointment having been discussed before the Master, in the presence of the solicitors for Mr. Woolmer, Mr. Bastard, Mr. Kingdon, and Mr. Salter. The claims made against the company exceeded 1,700*l.* For a time the provisional committee-men and the allottees were placed on the list of contributories, but they subsequently were removed on appeals, and the seven were ultimately declared the only contributories, and the proceedings thus taking place were the occasion of a large amount of costs being incurred. The four gentlemen, Mr. Woolmer, Mr. Bastard, Mr. Kingdon, and Mr. Salter, presented a petition to Vice-Chancellor Parker, on the 15th of May, 1851, to discharge the winding-up order, but on the 26th of January, 1852, it was dismissed with costs. The Master then made a call of 400*l.* on each of the seven managing committee; but that order, on appeal, was discharged, on the ground that the debts had not been ascertained nor the costs taxed. It then appeared that only 86*l.* 3*s.* of debts were demanded, all other persons having withdrawn their claims, although some actions were pending. The four gentlemen now appealed against the order made by Vice-Chancellor Parker, and the same was ordered to stand over until the Master could ascertain the debts and expenses, and make such call as he deemed right. These proceedings were taken, and the debts were found to be only 86*l.* 3*s.*, and the costs and expenses 3,019*l.* 4*s.* and the costs had been taxed. On the 3d of July, 1852, the Master made a call on the seven for the full amount in unequal sums, because each of them had paid money, and after deducting such money, these several sums would make up the amount in equal sevenths.

The four gentlemen now appealed from the order of the Vice-Chancellor, and against the order for the call.

*Bacon and Terrell*, for the appellants.

*W. P. Wood and Roxburgh*, for the official manager.

*Malins and Daniel*, for Col. Ellis.

LORD CRANWORTH, L. J. This case comes before us upon two pro-

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*Ex parte Woolmer; In re The Direct Excter, Plymouth and Devonport R. Co.*

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ceedings : first, upon a petition by four out of seven gentlemen, who constitute the list of contributories, as ultimately established in the Master's office, to discharge the winding-up order; and secondly, upon a motion by those same gentlemen, to discharge an order made for a call to raise a sum of 3,019*l.* 4*s.* We have already intimated in the progress of the argument, that when the affidavits came to be fully stated before us, the first application—the application by the petition to discharge the winding-up order which Vice-Chancellor Parker had refused to discharge—was entirely without foundation. We not only intimated that, but we intimated pretty clearly the ground on which we came to the conclusion, that the winding-up order, whether rightly or wrongly obtained, was an order obtained practically as much by the present petitioners as by Col. Ellis. They were both proposing to obtain what they thought, and perhaps rightly thought, was a fit and expedient course to take. They were both proceeding in that course; and Col. Ellis got the order first. It was prosecuted by him, but evidently with the sanction and concurrence of the other parties, who took as much part in the proceeding as he took. We are clearly of opinion that they could not say that Col. Ellis had done wrong in obtaining the order from the commencement. If he had not done it—if he had been a fortnight later, or a week later, they would have got it themselves. Both parties were proceeding to obtain the order. Col. Ellis obtains it, and the other party cannot now say that the order was wrongly obtained. We think the Vice-Chancellor was right in refusing the present petition to discharge that order; and, consequently, that the appeal from him must be dismissed, with costs.

Now, how is the matter with regard to the motion to discharge the order or the call? When it comes to be sifted, the way the matter stands is this, the great object of the parties obtaining the order—I say the parties, because I consider Mr. Woolmer and Mr. Kingdon, and other gentlemen who are trying to discharge the order, were just as much applicants for the order as Col. Ellis himself—was to fix the liability to the expenses of this company, not upon the managing committee only, the seven who were eventually constituted the only contributories, but to throw that liability over a much wider surface, to include among the contributories either the whole body of the provisional committee-men or certain of the provisional committee-men who were supposed to have rendered themselves more liable than the general body, and, in short, to disperse among thirty or forty the liabilities which have been eventually thrown upon the seven, and for that purpose they endeavored to place upon the list of contributories a great number of other persons. They succeeded in doing so, as far as the Master's office was concerned; but those parties, from time to time, appealed against the decision of the Master, and, it turned out, successfully appealed; so successfully, that instead of the number, thirty or forty, that was originally put on the list as being contributories, by successful appeals made by those parties so placed, their names were removed, and the number reduced to the present seven that constituted the managing committee. The result of all these appeals was, that very heavy costs were incurred; costs that practically amount to the whole of the sum now sought to

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be recovered; because, although there is one creditor of 83*l.* he may be put out of the case; and, therefore, it turns out that the attempt to wind up the affairs of the company, and to diffuse the liability among other persons besides the seven eventually found to be liable, has occasioned the sum, which the Master estimates at 3,019*l.* 4*s.* I say estimates, for I will assume, for the purpose of the present argument, that the exact amount never has been conclusively established, but this estimate is made, not on any loose grounds, for, even if Mr. Bacon is right in saying that there has never been any taxation, properly so called, at which the parties interested in cutting down the amount of the bill have been heard as against the party setting up the bill, yet the bill has been in a sense taxed. The Master has had it laid before a party competent to exercise a judgment upon it, and that party, one of the taxing Masters, has reduced it to an amount that leaves it at 3,019*l.* 4*s.* for the whole demand. The Master thinks it reasonable that that amount should be raised, and we both concur in thinking that was a very reasonable conclusion. It is true that this is a sum for which the parties that will be liable to pay it have, in one sense, had no value, that is, they get nothing; but I think the observation is very truly made on that remark, that that may be said of any person who having resisted a demand has to pay large costs. It is true that in one sense he gets nothing, because he was wrong, yet he got a *locum standi* to contest the point, whether he was right or wrong. If his views of the law had been right, he would have got a great benefit; it turns out that he was wrong, consequently he is like any other parties, litigants in a court of justice, who have *bonâ fide* endeavored to resist a demand, thinking they have a legitimate defence, and it turns out that they have no such defence. Who is to pay? Why, the parties who have caused this expense. They have been endeavoring to satisfy the court that they were not the only contributories, but that others were liable with them, and they endeavored to reduce the sum to a very small amount. They failed in doing so, and for their attempt they must pay. Now, we are desired to make a final end here. Probably it may be exceedingly reasonable that these parties should acquiesce in the taxation, on the arrangement which the Master has made about the amount that is to be raised. But we do not think that by our decision we necessarily conclude the parties, if they mean to say that this sum when raised is not to be applied in the manner proposed, because some of it will be unnecessary. That is open to them, if they should be so advised. It would be a very unwise thing so to act, but that is a matter in which they must exercise their own judgment. All that we can say is, that the Master exercised a sound judgment in directing that this amount which has been ascertained as nearly as it can be, must be raised for the purpose of paying these costs.

Then, that being so, the only question is, has he assessed it in a reasonable and proper manner? Here, again, not meaning to say a case might not be made hereafter to show that some of this must be returned to the parties, yet *primâ facie*, we think the Master has taken the most convenient and only practical course that could be taken; he has found

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seven people who are among themselves liable to pay this sum of money. In what proportion have they hitherto paid? He has taken the payments *de facto* made, and all made *bonâ fide*. It may be that what the present petitioners say is right, that Col. Ellis was less justified in incurring his costs in resisting the creditors, than they were in resisting their creditors, because their liability was more clear at the time Col. Ellis resisted than at their time; but these are niceties which, in the present state of our information, we cannot possibly inquire into. It appears to us, not only that the Master has done right in saying that this sum must be raised, but that he has taken the only legitimate mode of ascertaining the proportion in which each party is to contribute. He has taken the proportion arising from what each party has contributed; then, finding that what he contributed shows what he is to pay on the shares, he makes a ratio of equality among them. I do not know that it is an absolute equality, but they have all the same amount of shares. It seems to us that this is a reasonable and proper course to be taken, and, consequently, that this application ought not to have been made; and, therefore, this motion must be refused, with costs, in the same way as the petition of appeal.

KNIGHT BRUCE, L. J., expressed himself to be of the same opinion.

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THE WARDEN AND ASSISTANTS OF THE HARBOR OF DOVER v. THE SOUTH-EASTERN RAILWAY COMPANY.<sup>1</sup>

February 9, 10, 1852.

*Railway Company — Railway Act — Construction — Buildings connected with Railway.*

A local railway act enacted that the whole of certain ground in a seaport town, conveyed to the company, should be used solely for the purposes of the railway and the buildings connected therewith, except for coke ovens or any purposes (other than the necessary purposes of the railway), which might cause nuisance or damage to the vendors' other property:—

*Held*, not to restrain the company from allowing part of the building to be used as the custom-house, for passing the luggage of passengers and travellers and other custom-house duties.

Whether part of the buildings could be used as sleeping-rooms in connection with an hotel built by the company on the adjoining ground — *quære*.

THIS was a motion, by the plaintiffs, for an injunction to restrain the South-Eastern Railway Company, their servants and agents, from using or allowing a certain building erected by the company, or any part of such building, to be used for any other than the purposes of their railway; and in particular from the same being used for the ex-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 886.

amination of luggage or other purposes as a custom-house; or as lodging or sleeping rooms for travellers or passengers, or for the business of an inn or hotel. And that the company might be restrained from permitting the building to remain in its present or any form, the elevation of which was unapproved of by the surveyor of the plaintiffs; and from using, or permitting to be used, any part of the building for any purposes whatever until the elevation had been approved by the said surveyor.

The bill stated that by the 8th and 15th sections of an act of parliament (6 & 7 Vict. c. 51), intituled "An Act to enable the South-Eastern Railway Company to extend the line of their railway into the town of Dover," it was enacted to the following effect, namely, by the 8th section, "that no erection or building should be made without the consent of the plaintiffs or their surveyor, on certain land conveyed by them to the company, exceeding the respective heights therein specified;" and by the 15th section, "that the whole of the land to be sold by the plaintiffs to the company should be appropriated to, and used solely for, the purposes of the railway and the buildings connected therewith, except such part as might be required by the Board of Ordnance, or might be necessary to be left open for the increased width of the streets, in order to form the necessary approaches to the railway station; provided always, that the said ground should not be used or employed for building or erecting thereon any coke ovens or for any other purposes (the necessary railway purposes only excepted), by which any nuisance might be created or the other property of the plaintiffs in any way damaged." The plaintiffs also stated that a plan had been approved by their surveyor in 1843, of buildings then proposed to be erected by the company, but which were not completed, and that in 1851, the company erected the present building, and contrary to the approved plan, and that part of it was now used as her majesty's custom-house for examining the luggage of passengers and travellers, collecting duties, granting certificates to aliens, &c. And further that the upper floors of the building were laid out and intended to be used as bed-rooms in connection with an hotel erected by the company on the ground held by them on lease from their chairman, and which if so used would be to the injury of the plaintiffs' property, consisting of several large inns and hotels in Dover, and to prevent which injury, the stipulation in the above act had been inserted to restrain the use of the plaintiffs' ground conveyed to the company from being used for buildings otherwise than for railway purposes.

*Rolt and Renshaw*, for the motion.

*Roundell Palmer and Simpson*, against it.

The VICE-CHANCELLOR disposed, during the argument, of that part of the injunction which sought to restrain the keeping and using of the building at its present elevation: upon which point the following authorities were cited—*Lane v. Newdigate*, 10 Ves. 192; *Blakemore v. The Glamorganshire Canal Company*, 1 Myl. & K. 154; s. c. 2

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Law J. Rep. (N. S.) Chanc. 95; *Greatrex v. Greatrex*, 1 De Gex & S. 692; *The London and Brighton Railway Company v. Cooper*, 2 Rail. Cas. 312; *Lord Petre v. The Eastern Counties Railway Company*, 3 Rail. Cas. 367.

*Rolt* replied.

TURNER, V. C. After the consideration which I have had the opportunity of giving to this case, I do not think that any further time I might take would enable me to arrive at a conclusion more satisfactory to me than that which I am now prepared to state; and, therefore, I do not think it right to delay my judgment. With reference to the question which has been raised upon the subject of elevation, I wish to add to what I said yesterday that I by no means intend to lay down, that if a building should be erected contrary to a contract between the parties, it would not be within the power of this court to restrain the use of that building. I think that Lord Petre's case would go to that extent. What I meant to say on the question whether a building of the height of forty feet, or of forty-six feet, is to be allowed to be used, there being no doubt that the building might be erected of the height of forty feet, although it could not be erected of the height of forty-six feet, is, that such is not a case in which the court would interfere by injunction, unless some irreparable injury was shown to be likely to arise in the mean time. The question remaining to be considered is on the subject of, the use of the building for the purposes of the custom-house, and in connection with the bed-rooms; and the argument has been properly dealt with in the reply, and considered as confined merely to the 15th section of the act. In truth, it is on the 15th section of the act that the question wholly depends.

The first consideration which arises is, what are the purpose and object of the 15th section? I think the primary object of that clause is the laying out of the land purchased by the railway company from the warden and assistants, and I think so for this reason; the words of the clause are not that the whole of the land or ground to be sold by the warden and assistants to the company and the buildings thereon shall be appropriated to and used solely for the purposes of the railway, but that the land or ground to be sold shall be appropriated solely to and for the purposes of the railway, and the buildings connected therewith. It is, therefore, the use of the land and ground at which the clause properly looks; and, on the second branch of the clause, I think the same view arises. It is "except such part or portion thereof as may be required by the Board of Ordnance, or may be necessary to be left open for the increased width of streets, in order to form the necessary approaches to the station;" still looking not to the use of the buildings to be erected on the land or ground, but to the mode in which the land or ground is to be laid out or applied. The proviso seems to bear the same construction; "provided that the said ground shall not be used or employed for building or erecting thereon any coke ovens, or for any other purposes (the ne-

cessary railway purposes only excepted) by which any nuisance may be created or the other property of the said warden and assistants in any way damaged." Looking at this clause with that view, as directed to the use to be made of the land or ground, and not specifically to the use of the buildings on it, I think that this question really depends upon the narrow words which are contained in the clause "and the buildings connected therewith." The contract is that the whole of the land or ground shall be appropriated to and solely for the purposes of the railway and the buildings connected therewith; and the first question to be considered is, what is the principle to be applied to the construction of this clause? This is a purchase, in effect a deed of conveyance, a parliamentary conveyance under a parliamentary power to sell to a party, as owner in fee; and I think, therefore, that every sound construction requires that the restriction which is imposed upon the owner in fee, who becomes the purchaser under that clause, shall not be enlarged or extended beyond its necessary limits. Let us then consider what is the meaning of the words "buildings connected therewith."

I quite agree with the construction that "connected therewith" means connected with the railway; and I think there are three meanings which may be attached to those words. They may mean locally connected with the railway, or connected with the railway in the sense in which other buildings are connected with other railways, or connected with the railway as buildings applicable to that particular railway. I concur with Mr. Rolt's argument upon that point, that they do not mean locally connected with the railway. I think that the mere fact of the buildings being locally connected with the railway could not be meant by the expression "buildings connected therewith," as used in this act. Do they then mean buildings connected with this railway, in the same sense as other buildings connected with other railways? I do not think that that limited construction can be put on them, for the words are "solely for the purposes of the said railway, and the buildings connected therewith." I think this must be read "for the purposes of the said railway and the buildings connected with such particular railway." The construction of this clause, therefore, cannot be governed by considerations of what would or would not be connected with other and different railways. Taking the clause, then, as applying to buildings connected with this particular railway, it follows to be considered what is, within the language of this clause, properly a building connected with the particular railway. I really do not know what construction can be put upon, or what meaning can be attached to, the words "buildings connected with the railway," unless it be buildings which are used in some portion, or in some sense for the purposes of the railway. How, then, does the case stand with reference to these buildings being or not being used for the purposes of the railway? Why, the fact, so far as it relates to one portion of the case, as to the custom-house, is, that one of the rooms in this building is exclusively appropriated for the use of the custom-house; and I think I may take this to be so. But by the side of that room there is another room, in which the passengers wait whilst their luggage is



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being examined by the custom-house officers; and on the other side, there is another room into which the luggage, after it has been examined, is passed from the centre room, and then the luggage is separated and packed up again by the town porters (whose business seems to be, according to the evidence, to manage and carry the luggage in Dover), and then it is handed over a rail, or partition, to porters who carry it either to the railway or to any other place where it may be required.

Now is or is not that building so used connected with the railway? It is a building which to some extent, at least, is used for the purposes of the railway. Can I then say that a building which is, to a certain extent, used for the purposes of the railway is not to be considered as a building connected with the railway, because other purposes are added to the use of it, and because in that building are examined not merely the luggage of passengers who pass along the railway, but the luggage of other persons who may not leave Dover, or who may go to hotels in the town? I do not think it is a fair and reasonable construction of this act of parliament to hold that because a building is used, and, I think, according to the evidence in this case, principally used for the purpose of examining the luggage of passengers coming from abroad and passing along the railway (one of the affidavits states that there are very few other purposes for which it is used), it, therefore, follows that it is not a building used for purposes connected with the railway. I think, that being the primary purpose, I should not be justified in holding this use of the building to be such as the act of parliament does not authorize.

The last branch of the clause in the act itself seems to me to throw some light upon the construction on this point. The first branch of the proviso is a restrictive clause, and the second branch contemplates that the restriction imposed by the first would not be sufficient, and, therefore, extends it. It is by the first branch of the clause that the company are enabled to appropriate and use the building for the purposes of the railway; but still they might appropriate and use it for purposes that are a nuisance to the adjoining property, and the proviso is that they shall not use it even for those purposes if they produce any nuisance to the adjoining property. I think this shows that it was in the contemplation of the parties and the legislature, that the property might be used for other purposes of the railway, provided no nuisance was created by such use; otherwise I do not understand what is the meaning of that clause "or for any other purposes (the necessary purposes of the railway excepted) by which a nuisance might be created." It seems to contemplate that it might be used for other purposes than the necessary purposes of the railway, and that these other purposes might be a nuisance; and, therefore, it provides that it shall not be used for a nuisance.

Upon the whole construction, therefore, of this clause, I am of opinion that I cannot grant this injunction with reference to the custom-house. As to the bed-rooms I think the same argument that applies to the one applies also to the other. I am not prepared to say that there may not hereafter be such a use of these bed-rooms as

*Money v. Jorden.*

would induce this court to interfere; but as the case at present stands, I think there is no evidence before me that there is any intention to use them for any such purposes as would warrant me in holding that the building is not *bond fide* intended to be used, and to be considered as a building connected with the railway. Upon the whole I must refuse this motion, but I shall certainly refuse it without costs.

*Motion refused, without costs.*

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MONEY v. JORDEN.<sup>1</sup>

April 26, 27, 28, and 29, 1852.

*Injunction — Debt — Promise to forego — Irrevocable Engagements contracted.*

The court below having held that a party who, by representations, had induced another to enter into irrevocable engagements, must be restrained from taking proceedings to enforce obligations and promises, the abandonment of all intention to enforce which was the subject of those representations, the decree granting a perpetual injunction to restrain such proceedings was on appeal confirmed; Lord Justice Lord Cranworth dissenting, first, because this case was not within the principle of the cases on which the decree below was professed to be grounded, those cases depending on misrepresentation of fact, while here there was no misrepresentation of fact; and, secondly, because the promise alleged by the plaintiff was supported by the evidence of one witness only (who had since died), and which was not, in his lordship's opinion, supported by the surrounding circumstances, and was positively denied by the answer.

THIS case was heard, before the Master of the Rolls, in January, 1852, and he made a decree in the plaintiff's favor. The facts are stated in the judgment of his honor, 21 Law J. Rep. (N. S.) 581; s. c. 11 Eng. Rep. 182, and are somewhat fully entered into below, in the judgment of the lord chief justice. It will, therefore, be necessary merely to state that Mrs. Jorden, when Miss Louisa Marnell, became owner of a bond and warrant of attorney, upon which judgment had been entered up, and which Mr. J. W. B. Money had given to secure payment of 1,200*l*. This security she promised not to enforce; and, on the strength of that promise, Mr. J. W. B. Money married, the promise having been given in consideration of the father of Mr. J. W. B. Money abstaining from making a settlement, on his marriage, of real property, which he had conveyed to Miss Marnell, without consideration. The defendant, Mrs. Jorden, having issued execution on the judgment, and taken the plaintiff in execution, the bill was filed for a perpetual injunction, which was granted by the Master of the Rolls; and from that decree the defendants appealed.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 893. This case is reported on a point of practice, 20 Law J. Rep. (N. S.) Chanc. 174; s. c. 1 Eng. Rep. 146, and on the main question, 21 Law J. Rep. (N. S.) Chanc. 581; s. c. 11 Eng. Rep. 182.

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*Roundell Palmer* and *Bates* were for the respondent, the plaintiff, in support of the decree of the court below, and cited, in addition to the cases relied on by the plaintiff below, the following:— *Gale v. Lindo*, 1 Vern. 475; *Scott v. Scott*, 1 Cox, 366; *Podmore v. Gunning*, 5 Sim. 485.

*Willcock* and *F. T. White*, for the appellants, cited the following additional cases:— *Montefiori v. Montefiori*, 1 W. Black. 363; *Pasley v. Freeman*, 3 Term Rep. 51; *Ames v. Milward*, 8 Taunt. 637; *Maunsell v. White*, 1 Jo. & Lat. 539, 557.

April 29. KNIGHT BRUCE, L. J. In this case, which is before us on an appeal presented by Mr. and Mrs. Jorden, two of the defendants, against a decree made in the plaintiff's favor at the Rolls, in February last, the object of the suit was to be relieved against a debt, or an alleged debt, claimed to be due from him to the defendants, Mr. and Mrs. Jorden, or to them and the defendant Mr. Money, as a trustee in effect for Mr. and Mrs. Jorden, upon a bond and a judgment, or upon the latter, under which Mr. and Mrs. Jorden, in the names, I believe, of themselves and the other defendant, issued execution against the plaintiff's person, after the common injunction obtained in this cause in the year 1850, had been by an order of the 5th of August in that year dissolved, or as to Mr. and Mrs. Jorden dissolved absolutely (whether regularly or otherwise) upon the case stated in the answers of Mr. and Mrs. Jorden; or in the earlier of them. From the caption, however, the plaintiff was speedily released by means of another order in this cause, dated the 12th of December, 1850. [This order was an order under which the money due on the bond was paid into court by the plaintiff. The lord chief justice then entered into the history of the speculations which Miss Marnell's brother had suggested, and in which Mr. Money, jun. engaged; and proceeded]— Miss Marnell, who had been known for years to the plaintiff's family, was under obligations to his father, and appears to have regarded the plaintiff not merely with friendship but with affection,—that affection, I mean, which a kind aunt or an elder sister feels for a favorite nephew or a much younger brother. Miss Marnell, I say, thus circumstanced, not only did not regard her brother's conduct in this affair with approbation (it would, indeed, have been very odd if she had), but openly and repeatedly condemned it in very plain and strong terms, and after she had become his representative declared often to the plaintiff and to various persons, in effect that she would never claim the debt of the plaintiff, but would abandon, and indeed had abandoned it. . . . The plaintiff became engaged in 1844 to marry the lady whom in the following year he married. The engagement was, of course, communicated to his almost maternal friend, and if anything could have diminished her proneness to converse upon the debt and all its history, this, at least, seems not to have been so. She, or a solicitor for her, had retained the bond on which Mr. Hooper, was, as one of the obligors, considered to be liable, if his certificate under the bankruptcy could be avoided, of the probability of which

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there seems to have been some belief, though whether he would, under any circumstances, have paid, may be questionable; but she appears to have thought this chance worth something, and on that ground — and perhaps, also, from other easily conjecturable feelings, to have made a point of not parting with the instrument, though perpetually declaring in substance that the plaintiff should never be troubled about it. Endeavors, however, after the announcement of the plaintiff's intended marriage, were renewed or made to obtain her consent to the destruction or delivery up of the document, which every one seems to have considered as in force, notwithstanding the judgment, and as representing the debt. But the bond was too favorite a possession as well as too favorite a topic to be parted with, and was still kept by herself, or for her by a solicitor, who was not desirous that it should be given up. [His lordship then entered into a detail of the early history of the acquaintance between the parties in India, the acquisition of the Midnapore property, and stated his opinion to be that it was plainly impossible, upon the evidence to conclude that there was any valuable consideration for the conveyance, and then proceeded to read the answer of Mr. George Money, to the ninth and tenth interrogatories, as follows:] —

“ I say that shortly before the marriage of the said plaintiff, I had a conversation with the said defendant, Louisa Jorden, respecting the then intended marriage of the said plaintiff, and that on that occasion I said to the said defendant, Louisa Jorden, that I had given up the property at Midnapore to her without any consideration or sum of money for it, and that as the plaintiff was about to be married I should settle that property at Midnapore on the said plaintiff, unless the said defendant, Louisa Jorden, wholly relinquished all claim on the said plaintiff for or in respect of the said Charles Brown Marnell, and that the said Louisa Jorden, in reply, said, ‘ No, don't do that, I will never make any claim on your son William for or in respect of that debt, if you will let me remain in possession and enjoyment of the Midnapore property.’ And I say that it was on the occasion of that interview, agreed by and between the said defendant, Louisa Jorden, and myself, that in consideration of my permitting her to continue in the possession and enjoyment of that property, she should, and did, wholly abandon the said debt. And I say that such conversation had reference to the marriage of the said plaintiff; and I say that at that time, or soon afterwards, I had a conversation with the said defendant, Louisa Jorden, respecting any marriage which she might contract. To the tenth interrogatory I say, that she on that occasion repeated her desire to have the matter so settled that any husband she might marry should have no claim on the said plaintiff; and that she then repeated to me that in consideration of my having allowed her to continue in the enjoyment of the Midnapore property, she had wholly abandoned the said debt, and that she would never make any claim in respect of it against the said plaintiff. And I say that I then informed the said plaintiff the particulars of the said agreement with the said defendant, Louisa Jorden, and told him that he might safely marry, and that the said alleged debt due to the said

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defendant, Louisa Jorden, as an executrix of the will of the said Charles Brown Marnell, was wholly abandoned; and I say, that in consequence of such agreement with the said Louisa Jorden, I omitted to make and did not make any settlement of the said property at Midnapore upon the said plaintiff on the occasion of his said marriage." That is the whole of that witness's testimony. Now, in what Mr. Money has deposed, especially upon the ninth and tenth interrogatories, is he a witness of truth and accuracy? [His lordship then stated his reasons at length for giving credence to Mr. Money, who, since his depositions, had died, and then, after stating that Mrs. Jorden's account of the interview was different, proceeded to read her answer and that of her husband.] "They say the defendant, Louisa, speaking positively, and the defendant William Pru Jorden, speaking from the information of the defendant, Louisa, that prior to the said marriage of the said plaintiff, George Money had a conversation with the defendant, Louisa Jorden, with reference to a marriage then contemplated between the defendant and a Mr. Newman, in the said bill called Newenham, but in no manner relating to the marriage, or intended marriage, of the plaintiff, and that the said George Money told the defendant, Louisa Jorden, that the plaintiff threatened to annoy the defendant, Louisa, about the Midnapore property, but did not tell the defendant, Louisa Jorden, that the said conveyance of the said property at Midnapore (as a voluntary gift) was void if he, the said George Money, chose to settle the same on the plaintiff on the occasion of his marriage, or sold it to any purchaser for a valuable consideration, and that his sons had discovered, and were then aware that such would be the case, and that they had requested him to make such a settlement, and that he intended to do so as a security against the possible revival of any claim against the plaintiff by virtue of the said bond or warrant of attorney on the said judgment, by any person or persons into whose power the said documents might at any time come, and who might be ignorant of the total abandonment by the defendant, Louisa, of the share of the plaintiff in the said debt, or to such or the like effect, and the defendant, Louisa, in reply to the statement which the said George Money did make, indignantly asked what he, the said plaintiff, could do? To which the said George Money replied, 'Nothing; but he might annoy you,' and he asked the defendant Louisa if she meant to give up the bond, to which she replied that she would not; that Mr. Newman might give it up if he thought proper, but she would not. On which the said George Money observed, 'why put William,' meaning the plaintiff, 'under an obligation to a perfect stranger?' Whereupon the conversation ended."

[After enlarging on the discrepancies of these two accounts, his lordship pronounced that of Mrs. Jorden's to be erroneous, inaccurate, incredible; and then referred to a large body of evidence of Mr. Money and other witnesses, and after commenting on the truth of Mr. Money's testimony, notwithstanding the precise and technical nature of the language, and referring to the alleged, and, as his lordship believed, proved declarations of Mrs. Jorden, proceeded thus:] — I am

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convinced, as I have said, of the truth of the assertion, that she had on many occasions before the interview declared, after she had become the personal representative of Charles Brown Marnell, that she would not claim the debt in question from the plaintiff, but meant to abandon, and had abandoned it. I believe, moreover, that these declarations were sincere, and considered by the Money family to be sincere, but Mr. Money's acquaintance with legal subjects must have made him doubt, at least, whether any court of justice would, or could, treat them as binding on her. He must have known how liable to change are the intentions even of ladies; that this lady was likely to marry; that she might allow herself, or be allowed by others, to do so without a settlement, and that her husband might be a person of views and feelings very different from hers, and having no sympathy with her recollections. As the plaintiff was about to marry, therefore, nothing can consistently with the undisputed facts be more likely than that Mr. Money should have sought and had an interview with Miss Marnell for the purpose which he states, and that the conversation at it should have been of the direct, practical and technical kind which he mentions. He had been for years at the bar; he must have wished to have the abandonment of the debt placed on a basis firmer than it was. . . .

Considering as I do that the marriage was had with such and only such a settlement as was, in fact, made upon it in the belief created or sanctioned by Miss Marnell, in the faith induced by her language and conduct, that the debt in question never would be in the whole or in part demanded, and so thinking, independently of Mr. Money's evidence, I should possibly have held the decree before us to be altogether correct, if he had not been examined; but his testimony forms part of the case. I believe him to be substantially accurate as a witness; and so believing, I find that he proves an agreement with Miss Marnell for valuable consideration, by which she was, in my opinion, at and before the time of her own marriage, bound — bound, I think, upon equitable as well as legal principles; not the more, though certainly not the less, for the high authority of *Haigh v. Brooks*, 10 Ad. & E. 309, 320; s. c. 2 P. & D. 477; 9 Law J. Rep. (N. S.) Q. B. 99, 194. It was a breach of that agreement to seek to enforce the bond or the judgment obtained by Mr. Marnell (and under whatsoever circumstances of credit or discredit to his memory) against the plaintiff; a breach in respect of which, if not the only proper person, he was at least a proper person to sue, for he was told of the agreement before his marriage, and told that he might safely marry; safely, meaning freedom from the debt. That communication to him must be taken to have been authorized by Miss Marnell, and he must be taken to have married on the faith of it. I hold, therefore, with the decree, a decree possibly not unfitting the original merits, but certainly in my judgment forming a fit and just conclusion to the latter history of this much celebrated bond.

LORD CRANWORTH, L. J. Not being able to concur in the result at which both the Master of the Rolls and my learned brother have

arrived, I feel bound shortly to state the view which I take of the case, though it is hardly necessary to say that I feel great distrust of the accuracy of that view, differing, as it does, from such authorities. The plaintiff rests his title to relief on one of two grounds; either, first, that the marriage having taken place on the repeated assurances of Mrs. Jorden that she never would enforce payment of the debt secured by the bond and judgment, it would now be a fraud on her part to act in violation of those assurances; or, secondly, that a valid and binding contract was entered into between the plaintiff's father and Mrs. Jorden, before the plaintiff's marriage, whereby she stipulated for a valuable consideration, the benefit of which she has had, that she would never enforce payment against the plaintiff of the money so secured.

The Master of the Rolls decided in favor of the plaintiff on the first ground. His honor thought the case was brought within the authorities which established this principle; namely, that where a person represented a particular state of circumstances as existing with a view to induce another to act, or under circumstances when it must have been obvious that another would probably act on the faith of such representation being true, and such person has so acted, there it shall not afterwards be permitted to him who has made such a representation to enforce against the person whom he has misled, any rights to which he may be entitled by reason of the facts not having been such as he represented. His honor referred especially to the cases of *Gale v. Lindo*, *Montefiori v. Montefiori*, and *Neville v. Wilkinson*, 1 Brown's C. C. 543. With the most sincere respect for the judgment of Sir John Romilly, I do not think that the doctrine on which he relies is applicable to the case now before us. In all the cases referred to, there had been the misrepresentation of a fact material in influencing the conduct of the person to whom it was made, and what the court has done has been to hold the party making the representation bound by what he has stated. It has considered that it would be to permit a fraud, if it were to allow any one first to gain an object by representing a particular fact to exist, and then, when the purpose has been accomplished, to turn round and say, "I shall now act on the very truth, which is not such as I represented it." In all such cases the court acts merely on the principle of preventing fraud, not at all on contract. But here there was no misrepresentation of any fact whatever. Mr. C. B. Marnell died in 1843; on that event Mrs. Jorden, then Miss Marnell, as his executrix and residuary legatee, became entitled to the money secured by the bond and judgment. That she did between that time and the plaintiff's marriage in June, 1845, repeatedly state her positive determination never to enforce payment of that money is a point on which I have no doubt. The evidence abundantly establishes that to have been the case. I think, further, she must be taken to have made such statements, though not to Lady Poore, the mother of the plaintiff's intended wife, yet under circumstances which she could not but know that what she said would probably be communicated to her, and might very likely influence her in the arrangements to be made on the occasion of her

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daughter's marriage. Still there was no fact misrepresented. Mrs. Jorden never concealed the existence of the bond or judgment. If she had with a view to the arrangements to be made on the plaintiff's marriage, said that she had no legal demand on the plaintiff, that the defendant had been released or paid, or that for any reason the bond and judgment were legally invalid, or had made what amounted to such a representation, then indeed the cases referred to would be strictly applicable. It would then be a fraud in her now to attempt to enforce a security which she had so represented as having no valid existence. But no such statement ever was made; Mrs. Jorden always stated that she had the bond, and in effect that it gave her a legal right against the plaintiff, though at the same time she stated that she had abandoned all intention of enforcing it. After such a statement the parties contracting marriage cannot justly say that they were deceived as to the facts; they knew the facts as well as Mrs. Jorden herself knew them; that is, that Mrs. Jorden had a legal demand on the plaintiff, but which, from what had passed, they were fully persuaded she would never enforce. This is a state of things which does not, as I think, entitle the plaintiff to any relief in this court, on the ground of its being a fraud in Mrs. Jorden now to enforce her securities.

But though the plaintiff may not be entitled to relief on the head of fraud, yet if Mrs. Jorden did before and in consideration of the marriage, bind herself not to enforce the bond or judgment, the plaintiff might be entitled to relief on the head of contract, which leads me to consider whether, on a fair view of the evidence, she ever did so contract.

[His lordship then entered into a minute examination of the evidence, and proceeded:]

Now as we intimated more than once during the argument, if we can act on that as testimony to which we are judicially warranted in giving credit, the plaintiff has no doubt established a title to relief. Mrs. Jorden, according to this evidence, certainly bound herself, for a valuable consideration, never to enforce the bond against the plaintiff. It was, at least, doubtful whether Mr. Money, the father, had not the power of defeating Mrs. Jorden's title to the Midnapore property. The evidence to which I have referred goes to show that he agreed with Mrs. Jorden shortly before the marriage, and with a view to his son's interests on that event, that her title to the Midnapore property should never be disturbed, in consideration of an agreement at the same time entered into by her, that she would never enforce the bond. This would be a valid contract, whether in truth Mrs. Jorden's title to the Midnapore property could or could not be questioned. The doubt existing on the subject was a sufficient consideration, as was established by the case of *Haigh v. Brooks*, referred to by my learned brother in the course of the argument. If, therefore, it is made out by evidence on which this court can safely and properly act, that this agreement was in fact come to, then undoubtedly the plaintiff is entitled to the relief he asks. But I feel great difficulty in saying that this is evidence on which, according to the doc-



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trine of this court, it is open to us to act. The evidence of contract rests on the testimony of Mr. Money alone, not confirmed, in my opinion, by surrounding circumstances, and positively denied by the answer, and cannot be relied upon consistently with the rules of this court. The rule of the court acted upon from the earliest times on this subject is clear. It is stated by Lord Eldon, in *Evans v. Bicknell*, 6 Ves. 184. "A defendant," Lord Eldon says, "in this court has the protection arising from his own conscience in a degree in which the law does not affect to give him protection. If he positively, plainly, and precisely denies the assertion, and one witness only proves it as positively, clearly, and precisely as it is denied, a court of equity will not act upon the testimony of that witness." The alleged agreement, then, being as positively denied by Mrs. Jorden, as it is affirmed by Mr. Money, is there anything in the testimony or in the surrounding circumstances enabling the court to say it will disregard the answer, and act on the evidence of a single witness? I confess I think not.

Having thus stated my reasons I have only to add that I can feel no regret in knowing that my doubts will not influence the decision, as my learned brother, being of opinion that the decree of the Master of the Rolls is right, it will remain unaltered.

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LUMLEY v. WAGNER.<sup>1</sup>

May 22, 26, 1852.

*Injunction — Negative Covenant.*

Mdlle. J. W. agreed in writing with L. that for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that, during her engagement with L. she would not sing elsewhere without his license in writing. Afterwards, J. W. contracted with G. to sing and perform at his theatre during the period specified in her engagement with L. Upon bill by L. praying simply that J. W. might be restrained from singing and performing elsewhere than at his theatre during the period specified, the court granted an injunction accordingly.

Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants. — *Kemble v. Kean*, (6 Sim. 333,) and *Kimberley v. Jennings*, *Ibid.* 340; s. c. 5 Law J. Rep. (n. s.) Chanc. 115, disapproved of.

But in such cases the court will decline to interfere where the jurisdiction cannot be beneficially exercised, as in *Collins v. Plumb*, (16 Ves. 454,) or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot specifically perform. *Hills v. Croll*, 2 Phil. 60; s. c. 14 Law J. Rep. (n. s.) Chanc. 444.

In November, 1851, Joanna Wagner and Albert Wagner her father, by Dr. Joseph Bacher as their agent, entered into an agreement in

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<sup>1</sup> 21 Law J. Rep. (n. s.) Chanc. 898; 1 De Gex, Macnaghten, and Gordon, 604.

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writing with B. Lumley, the plaintiff, in the French language, which, as translated, was as follows:—

“The undersigned, Mr. B. Lumley, possessor of Her Majesty’s Theatre in London, and of the *Italienne* at Paris, of the one part, and Mdlle. Joanna Wagner, cantatrice of the court of his majesty the king of Prussia, with the consent of her father, Mr. Albert Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract:—First, Mdlle. J. Wagner binds herself to sing three months at the theatre of Mr. Lumley, Her Majesty’s at London, to date from the 1st of April, 1852, (the time necessary for the journey comprised therein) and to give the parts following—1. *Romeo*, ‘*Montecchi*,’ 2. *Fides*, ‘*Prophète*,’ 3. *Valentine*, ‘*Huguenots*,’ 4. *Anna*, ‘*Don Juan*,’ 5. *Alice*, ‘*Robert le Diable*,’ 6. An opera chosen by common accord. Second, the three first parts must necessarily be—1. *Romeo*; 2. *Fides*; 3. *Valentine*, &c., &c. Third, these six parts belong exclusively to Mdlle. Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented by any cause whatever from giving these operas, he is nevertheless held to pay to Mdlle. J. Wagner the salary stipulated lower down for the number of her parts, as if she had sung them. Fourth, in the case where Mdlle. J. Wagner should be prevented by reason of illness in singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mdlle. J. Wagner binds herself to sing twice a week during the run of the three months; however, if she herself was hindered from singing twice in any week whatever, she will have a right to give at a later period the omitted representation. Sixth, if Mdlle. J. Wagner, fulfilling the wishes of the direction, consents to sing more than twice a week in the course of three months, this last will give to Mdlle. J. Wagner 50*l.* sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mdlle. Wagner a salary of 400*l.* sterling, per month, and payment will take place in such manner that she will receive 100*l.* sterling, each week. Eighth, Mr. Lumley will pay by letters of exchange to Mdlle. Wagner, at Berlin, on the 15th of March, 1852, the sum of 300*l.* sterling, a sum which will be deducted from her engagement, in his retaining 100*l.* each month. Ninth, in all cases, except that where a verified illness would place upon her a hindrance, if Mdlle. J. Wagner shall not arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have a right to regard the non-appearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, in the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and, in that case, Mdlle. Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

“(Signed)

JOANNA WAGNER.  
ALBERT WAGNER.”

“Berlin, Nov. 9, 1851.”

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Shortly after the execution of the above contract Dr. Bacher produced the same to Mr. Lumley in Paris, whereupon the latter objected that it did not contain the usual clauses prohibiting Mdlle. Wagner from singing or performing, during her engagement with Mr. Lumley, in any other place in England without his consent, whereupon Dr. Bacher, on the 15th of November, as agent of the Wagners, added thereto a clause to the following effect:—

“Mdlle. Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley. (Signed) Dr. Joseph Bacher, for Mdlle. Joanna Wagner, and authorized by her.”

Early in March the Wagners wrote to Mr. Lumley, requesting an enlargement of the time for the lady's appearance in London, which was consented to. Subsequently, on the 5th or 6th of April, Mdlle. Wagner and her father entered into an agreement with the defendant, Gye, whereby it was agreed that they should abandon the contract with Mr. Lumley, and that the defendant, Mdlle. Wagner should sing at the “Royal Italian Opera,” Covent Garden, instead of “Her Majesty's Theatre.” The bill was filed on the 22d of April, 1852, by Mr. Lumley, against Mdlle. Wagner, Albert Wagner, and F. Gye, praying that the defendant, Joanna Wagner might be restrained by injunction from singing and performing, or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place, without the sanction or permission in writing, of the plaintiff during the existence of the agreement with the plaintiff mentioned in the bill. The Vice-Chancellor Parker, on the 9th of May, granted the injunction in the terms of the prayer; and the defendants now moved to dissolve it.

*Bethell, Malins, and Martindale*, for the motion.

*Bacon, Hislop, and Clarke*, contra.

The following cases were cited:—*Martin v. Nutkin*, 2 P. Wms. 266; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; s. c. 2 Cox, 4; *Morris v. Colman*, 18 Ves. 437; *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Ibid. 340; s. c. 5 Law J. Rep. (N. S.) Chanc. 115; *Gervais v. Edwards*, 2 Dr. & War. 80; *French v. Macale*, Ibid. 269; *Barret v. Blagrove*, 5 Ves. 555; *Collins v. Plumb*, 16 Ibid. 454; *Clark v. Price*, 2 Wills. C. C. 257; *Baldwin v. The Society for the Diffusion of Useful Knowledge*, 9 Sim. 393; *Hooper v. Brodrick*, 11 Sim. 47; s. c. 9 Law J. Rep. (N. S.) Chanc. 321; *Rolfe v. Rolfe*, 15 Sim. 88; *Whitaker v. Howe*, 3 Beav. 383; *Dietrichsen v. Cabburn*, 2 Phil. 52; *Hills v. Croll*, 2 Phil. 60; s. c. 14 Law J. Rep. (N. S.) Chanc. 444; *Smith v. Fromont*, 2 Swanst. 330; *Stocker v. Brocklebank*, 3 Mac. & G. 250, s. c. 5 Eng. Rep. 67; *Swallow v. Wallingford*, 12 Jur. 403.

THE LORD CHANCELLOR. This case arises out of a very simple contract. Without considering for a moment the difficulties which have been raised by the conduct of the parties, and independently of the

question of law, the contract simply is, that this young lady should sing at the Queen's Theatre, for a certain number of nights, and that she should not sing elsewhere during (for that is the true construction of it) that period. Nothing can be more simple than the case on which I have to decide the points of law that have now been so elaborately and so well argued. As I can understand the objection, it is this: that there is no case in which this court can — that is, in which this court ought to — grant an injunction, unless in cases that are connected with specific performance, or cases where, if the injunction is to compel a party to forbear from doing an act, or to compel a party not to perform an act, the injunction will execute the whole of the agreement or the whole of that which remains to be performed. Without going into other cases of injunction, I understand that to be the precise case that is now presented before the court. The point, therefore, first is, how that stands upon principle; and, in the next place, how it stands upon authority. Before I consider it upon principle, I will refer to two or three of the cases that have been cited by the defendants, the appellants, in support of the argument.

The first case was that of *Martin v. Nutkin*, where an injunction was granted to prevent the ringing of a bell. That was a case in which the court did issue an injunction restraining an act from being done, which can in no respect be considered as a case in which the court could have granted a specific performance; but that case falls within the second of the class of cases which the defendants admit are proper cases for the interference of the court, because there the ringing of the bell had been agreed to be suspended by the churchwardens, who represented the parish, in consideration of money paid by Martin and his wife in the erection of a cupola and clock and so on, the price in fact stipulated for by the parish in consequence of their relinquishing the great enjoyment of constantly hearing the church bell ringing at five o'clock every morning at certain periods of the year. In that case, the parish accepted the benefit, but refused the compensation. Lord Macclesfield granted an injunction, and the lords commissioners, on the hearing of the cause, continued the injunction during the lives of Martin and his wife. That is a case in which the court did grant an injunction to prohibit a party from doing an act, in which this court could never have interfered by way of directing a specific performance. The next case referred to is *Barrett v. Blagrove*, which came before Lord Rosslyn. There a lease had been granted by the proprietors of Vauxhall Gardens, with a negative stipulation that the tenant of the house was to do no act to damage the custom or business of Vauxhall itself. After some time the proprietor of Vauxhall filed a bill for an injunction against the then tenant of the house for breaking that stipulation, and Lord Rosslyn granted an injunction; but Mr. Bethell observes, how remarkable are the words which Lord Rosslyn made use of; for he said it was a case of specific performance. Next, a case is referred to that came before Lord Eldon, where he dissolved the injunction; there being so much acquiescence, he said that the court could not interfere, but he also treated it as a case of specific performance.

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So far as the words go, the decisions of those eminent men would seem to justify the argument addressed to me. But what is the fact with respect to the case decided by Lord Rosslyn? The granting of the injunction was, in that case, a specific performance; because the prohibition, preventing the man from doing the act, does as effectually make him perform his agreement, as if the court compelled him to do the act by compelling the direct performance of it. The court said, you shall not open your house as a house of entertainment. That was the performance of the agreement in substance, because the man could not then do the act complained of. Therefore, the term "specific performance" was aptly applied to such a case; but not in the sense addressed to me under the first general head. It is no objection to this jurisdiction to say, that the remedy is at law; the decision in *Robinson v. Lord Byron* is a clear illustration of that. There the remedy was at law; but this court felt no difficulty in restraining Lord Byron from abusing the right of the head of the water which he had. There are cases, such as that cited for the appellants, *Collins v. Plumb*, in which the power was not exercised; but it was there admitted that the court had the power of preventing the act from being done; though the power will not be exercised, because it cannot be exercised properly or beneficially. The negative covenant not to sell water was not enforced by Lord Eldon, not because he had any doubt of the jurisdiction, but because it was impossible to measure the damage sustained by the different parties, and from the nature of it the court could not interfere. The learned judge did not mean to break in on the general rule, whatever it may be; but refused to exercise the jurisdiction on very sufficient grounds.

I took the liberty of calling counsel's attention to those familiar cases of attorneys' clerks and surgeons' or apothecaries' apprentices and the like, that are frequently arising in this court. On what principle are they decided? I am told that they are decided upon this principle: that they arise out of benefits received and out of concluded contracts, and that, therefore the prohibition finishes everything and brings it within the second category. I do not apprehend the jurisdiction of the court depends upon that. Take the case of landlord and tenant. When that relation is fixed and consummated by the contract and by the lease executed, what is there to make that case differ from any other? No doubt, in a contract to grant a lease, there might be a specific performance; but the lease being executed with a negative covenant not to do a particular act, the moment you are called upon to perform that covenant by inhibition, you have to deal upon that covenant alone. And scarcely, I think, a case has occurred in this court in that relation, in which there were not many stipulations affirmative remaining to be performed in the very contract from which the court picks out this particular negative covenant for the purpose of enforcing it by prohibition. In leases there are often twenty affirmative covenants, and, perhaps, but one negative covenant, that the tenant, for example, is not to cut timber trees, or lop them, or do any similar act. The court does not ask what remains to be performed under the contract; but the court gives effect to the nega-

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five contract, and specifically executes it by prohibition. All these cases are in direct contradiction of the rules that have been so elaborately pressed upon me.

This is a mixed case; but of this nature: it consists not of two acts to be done by each of the parties;—not that Mr. Lumley is to do one act, and the young lady is to do another, but the acts are to be done by the young lady alone. The one is ancillary to the other; they are co-equal and co-existent, and operate together, and not in opposition. She says, “I will sing for three months at your theatre, and during that time I will not sing for any one else.” In fact, it is one contract, and according to all sound and judicious construction, and according to the true spirit and essence of men’s acts, an agreement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another. It appears that according to the lady’s capacity and physical powers, she was by the exertion of her abilities to aid the theatre to which she attached herself; and if there was no such stipulation not to perform at another theatre, she would have broken the spirit and true meaning of the contract by entering into this other contract. Let us see for a moment what is the principle of the jurisdiction of the court. That principle is to bind men’s consciences to a fair and liberal performance of their agreements. I have always thought you may attribute a great deal of the right feeling and fair dealing that exists between Englishmen to the exercise of this jurisdiction. Men are not suffered by the law of this country to depart from their contracts at their pleasure. It does not leave the party with whom the contract has been broken to the mere chance of what a jury may give in the shape of damages, but it enforces, where it can, the literal performance of the contract; and this I believe has mainly tended to produce the good faith that exists to a greater extent in this country than in many others. Although the jurisdiction of the court is not to be extended, a judge would desert his duty if he did not act up to the rule which his predecessors have laid down as the proper exercise of a most valuable and wholesome jurisdiction. Where is the mischief in this case of exercising that jurisdiction? It is objected that if I refuse this application, I exclude this lady from performing at Covent Garden, when I cannot compel her to perform at the Queen’s Theatre. I cannot compel her to perform, of course; that is a jurisdiction that the court does not possess, and it is very proper that it should not possess that jurisdiction; but what cause of complaint is it that I should prevent her from doing an act which may compel her to do what she ought to do?—though that is not the object the court has in view; for the court cannot indirectly do a thing, and I disclaim doing a thing indirectly which I cannot do directly. In my opinion this is a proper case for interference, and, though I cannot compel the execution of the whole of the contract, I leave nothing unaccomplished by my order which I hold it is in the power of the court to accomplish. She will be committed to prison by this court if she does any act in breach of this injunction; and it will have this effect: by preventing her from doing the act, there will be no case, in an action by Mr. Lumley

against her, for such an amount of vindictive damages as a jury might probably be disposed to give, if she exercised her talents in the rival theatre. It appears to me that, in granting the injunction, I shall do nothing contrary to the settled rule of the court, but merely carry out, as far as I can, the whole power of the court on one subject, which fortunately has a bearing upon another subject which I cannot directly touch.

This case has been elaborately argued upon the authorities. I bow to the authorities. I mean to execute the authorities; I am giving no authoritative decision from myself; I mean to follow the current of authority of my predecessors; to weigh their opinions where there is a difference of opinion between the judges, that have preceded me, calmly and patiently to consider them, and to arrive at the best conclusion I can as to the meaning to be drawn from the various expressions which I find in those decisions. With respect to the case of *Morris v. Colman*, it was said that Lord Eldon had decided that case as a case of partnership, but he did not exclusively decide it as a case of partnership; and I have come to a clear conclusion that Lord Eldon would have granted the injunction in that case, though it had not been a case of quasi-partnership. The case of *Clark v. Price* does not apply, for there was no negative stipulation, and therefore Lord Eldon very properly refused an injunction. As to the case of *Kemble v. Kean*, decided by Sir L. Shadwell (of whom I wish it to be understood that I speak with the highest respect), I should have come to a different conclusion; for there was in that case a negative covenant. My apprehension is that the case of *Kemble v. Kean* was wrongly decided, and could not be maintained. That learned judge followed that decision up in *Kimberley v. Jennings*; but with great submission, it appears to me that the whole of the authority of Vice-Chancellor Shadwell is removed by himself, and I think the case of *Rolfe v. Rolfe* displaces the entire of his authority upon this question. In the case which has been referred to, *Hooper v. Brodrick*, though the court would not enforce the affirmative covenant, yet it would have restrained the defendant from breach of the negative covenant. This case is directly against the appellants. In *Smith v. Fromont*, there was no negative covenant, and consequently it does not bear upon this question. An observation has been made upon an opinion of my own in Ireland, *Gervais v. Edwards*, and I abide by that opinion. There the whole case was properly a case of specific performance; but, from the nature of the contract itself, there was a portion that could not be executed. It is said that in *Hills v. Croll*, Lord Lyndhurst refused to enforce by injunction a negative contract. But I find in that case, that while A was to supply B with certain acids, and B was not to get the acids anywhere else, there was no power to compel A to supply B with the acids; and therefore B's manufacture might be paralyzed, and he might be ruined if A did not supply him; therefore Lord Lyndhurst said, I cannot interfere. It is supposed that Lord Lyndhurst improperly applied there the rule that was properly applied in *Gervais v. Edwards*; but he did not improperly apply it; as he could not enforce an affirmative covenant with respect to one part, he would

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not enforce a negative covenant as to the other, for by doing so he might ruin the man. With respect to the case of *Dietrichsen v. Cabburn*, I wholly deny that it was a case of partnership; it was strictly a case of principal and agent, and it was only because there was that negative contract that the court gave effect to it.

The clear result from all those cases in my mind is, that the point of law has been properly decided in the court below, and that I must, as regards that point, affirm the decision. As there has been so much controversy about the case, I am not sorry that it has been brought here for further consideration. Whether my opinion is enough to settle the point is another question; but I entertain no doubt whatever upon it. It was thought necessary, also, to go into the merits, and it was insisted that if, upon the merits, I ought not to give relief to Mr. Lumley, I should not interfere, even if the point of law was in his favor. The merits rest upon two points; first of all, that there was an abuse of confidence on the part of Dr. Bacher, who was constantly represented to be the paid agent of Mr. Lumley, of which there is no evidence; though the fair inference is, that Dr. Bacher is not a gentleman so very fond of music as to be travelling over the continent with two terms in his pocket without getting some payment for his trouble. It is always desirable to avoid harsh representations, and there has been a wilful charge of misrepresentation against Dr. Bacher by this young lady and her father. I never saw a case in which there was less foundation for that charge. The young lady got introduced to Dr. Bacher, and she was so anxious that he should ascertain her musical talents that, as he had no opportunity of seeing her in public, she sang to him in private, that he might represent her vocal abilities to the proprietors of theatres; and Dr. Bacher, approving of Mdlle. Wagner's abilities, put himself in communication with Mr. Lumley and with the director at that time of the French Opera House in Paris, to procure her engagements. This case admits of no doubt as regards this transaction. Mr. Lumley had a printed form of agreement, containing many onerous penalties, no doubt, and containing the precise provision on the introduction of which into the agreement the charge of misconduct is founded. That printed form was signed by Mr. Lumley and sent to the Wagners. The provision was not introduced to deceive the young lady, because it was contained in the general form of agreement entered into by Mr. Lumley; and when the young lady and her father received the document, with which they were dissatisfied, they must have known that it was the common and usual form of agreement used by him. The father appears to be as capable of drawing an agreement as Mr. Lumley. He repudiated Mr. Lumley's agreement, and drew the agreement now before me, and excellently well drawn it is; and I never knew a man so unlikely to be deceived by the introduction of a term of which he did not approve. Dr. Bacher took back the agreement drawn up by the lady's father to Mr. Lumley, and the provision being omitted he added it, stating that he was authorized by Mdlle. Wagner to do so. The Wagners do not tell us when they received that; but it is perfectly clear that they received it before the several



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letters now before the court; and in no one of those letters do they reject the term that has been introduced. *Mdlle. Wagner* and her father grumble about its introduction; but the fact of finding fault with it without saying they will not be bound by it, is an acquiescence. They had full opportunity to reject the contract; but instead of rejecting it, they accepted it. It is much too late now to raise any objection on that ground, and therefore I overrule that objection.

The remaining objection is a very simple one. It appears that a sum of 300*l.* was to be paid to this young lady on a day named; and I am told by the decision of the court below that that was not a reciprocal obligation, that that was an independent contract; in which I cannot agree; and certainly so far I shall come to a different conclusion. *Mr. Lumley* could never have come here unless he set himself right by tendering the 300*l.* which he had agreed to pay within a reasonable time. I am certainly of opinion that *Mr. Lumley* was bound to pay the 300*l.* before he could enforce the contract; and the question is, when he was bound to pay it. By the original contract he was to pay it by a given day in March; but before that day arrived the young lady and her father applied to *Mr. Lumley* to enlarge the terms of the contract. He accedes to that, and the father writes to him, saying where he is to send the money. In the mean time a letter was written by *Dr. Bacher*, on the 9th of March, to the *Wagners*, saying he had the 300*l.* to pay *Mdlle. Wagner*, and asking her how and when he should send it. He swears particularly to the contents of that letter, and he swears he received no answer to that letter. Now, what is the allegation of the other side? They say they remember that they received the letter, but contradict in the flattest terms *Dr. Bacher's* statement with regard to the contents of that letter. One naturally then calls for the production of that letter, and I am not satisfied with the grounds that have been given for the non-production of that letter. I need not repeat my reasons. I have stated them in the course of the argument; but then it is said that *Dr. Bacher* might make this statement, and declare, if the letter was produced, that he had forgotten the contents. Now, can there be any stronger proof of the truth of what he says than this, that he made that statement when he had reason to expect that the letter would be produced? He did not know, at the time he swore, but that it was in existence, and might be produced the next moment to contradict him. If a party at his peril makes that statement, when the other party merely says in reply, "The contents are not true, the letter is in my depository at Berlin; but though I have written for it, and other letters have been sent to me, that letter has not been sent, and I have no doubt but it is destroyed," nothing can be more unsatisfactory than that answer. On the 18th of March, *Mr. Lumley* wrote to them, stating that *Dr. Bacher* had undertaken to pay to them a bill of exchange for 300*l.* and by that time he had no doubt but all was in order. What was done by *M. Wagner* and his daughter? They never say a single word or make the slightest complaint. They make no communication to *Mr. Lumley* or *Dr. Bacher*, but quietly

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remain satisfied, the money being, as I suppose, in Dr. Bacher's hands. When the necessity for producing the money arose, the sum was forthcoming. It is quite clear to me that whatever difficulty there might be in raising the money, it would have been sent as a matter of course, if the lady had insisted upon it. I consider, when she was obtaining a favor from Mr. Lumley by re-opening the contract, which could only be done by the compliance of Mr. Lumley, she was not at liberty to lull his prudence to sleep or leave him under the impression that the bill for payment to her had been appropriated, as he believed it was. Observe what happens besides. Very violent affections are suddenly raised up between persons abroad on a very short acquaintance. This young lady suddenly becomes attached to Dr. Bacher, she calls herself his child, she says no person had ever such a *chargé d'affaires*, and asks him to go to Hamburgh, to accompany her to London to fulfil her engagement, — though he is afterwards represented as a false friend. He writes to her to say that he will do so; but not a word is said by her about the non-payment of the money, and then the money would have been perfectly in time to answer the very object for which it was agreed to be paid. Under these circumstances, this gentleman comes to Hamburgh to accompany the young lady to London; but instead of going to London for that purpose, she enters into an agreement with Mr. Gye on the 5th of April, and on the 6th she goes before a notary, and makes an absurd declaration that she is released from her previous contract; but this court says she is not released from her contract; the order of this court is greater than the release of the notary, and she must obey the order of this court. She has nothing to complain of; it is entirely her own fault; she wished to prevent the money being paid that she might escape the liability to perform the contract that was entered into with good faith on the other side; and, therefore, though finding no fault that the point of law was raised, I must refuse this motion, with costs.

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NAVULSHAW v. BROWNRIGG.<sup>1</sup>

July 22, 24, 1852.

*Factors' Act, 5 & 6 Vict. c. 39 — Validity of Pledges.*

The plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him, as an advance, upon account of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods to recoup himself the bills drawn upon him by the Liverpool

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 908; 16 Jur. 897.

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merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be decreed to pay him the amount produced by the sale of the pearls:—

*Held*, affirming the decree of the court below, that the pledge was valid within the 5 & 6 Vict. c. 39, as made *bonâ fide* and in the ordinary course of business.

Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; *secus*, if the pledgee had notice that the consignee was prohibited from pledging.

THIS was an appeal, by the plaintiff, from a decision of the Vice-Chancellor, Lord Cranworth, dismissing the bill. The case is reported 21 Law J. Rep. (N. S.) Chanc. 57; s. c. 7 Eng. Rep. 106, where the facts are fully stated.

*Bethell and Lewis*, for the appellant.

*Rolt and F. Goldsmid*, contra.

The following additional cases were cited:—*Gill v. Kymer*, 5 Moore, 502; *Haynes v. Foster*, 2 Cr. & M. 237; *Stedman v. Martinnant*, 13 East, 427; *Ex parte Skinner*, 1 Deac. & C. 403.

And as to the equity of the bill:—*Mackenzie v. Johnston*, 4 Mad. 375; *Mitford's Pleading*, p. 159, ed. 1827; *Adams v. Fisher*, 3 Myl. & Cr. 526; s. c. 7 Law J. Rep. (N. S.) Chanc. 289; *Lockwood v. Abdy*, 14 Sim. 437; *King v. Rossett*, 2 You. & J. 33.

Jan. 24. THE LORD CHANCELLOR. This is a case of very much importance to the mercantile world, and depends upon the construction of certain acts of parliament. The general question is as to the right of the plaintiff to recover back certain pearls which he consigned to this country for sale, and which were pledged by his consignee to his agents, and were afterwards sold by his pledgee under circumstances which I shall presently state. The first point to ascertain is, what is the law as regards the right of the factor to pledge goods which are intrusted to him for sale?

The common law was upon the subject very strict; for not only could not the factor pledge the goods, however necessary it might be to raise money for the purposes of the principal, so as to give the pledgee the right to retain the produce of them if he sold them, but not even to pay bills drawn upon the original agent, and paid by the pledgee to the credit of the original holder; so that, in point of fact, by the common law there could be no dealing by way of pledge in this country with goods which had been remitted to an agent without an express authority to pledge. To meet that inconvenience, several acts of parliament were successively passed. The first of them was the act of 4 Geo. 4. c. 83. That statute merely gave to the person who took the pledge, the right of the person who pledged; so that, if the agent had a right as against his principal, that right was communicated to the pledgee and nothing further. Then came the 6 Geo. 4. c. 94, which, by section 2, provided that persons in possession of any bill of lading and so on, should be deemed the true owners of them

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so far as to give validity to any contract or agreement to be made by such person or persons intrusted and in possession, with any person or persons for the sale or disposition of those goods, or for the deposit or pledge thereof, provided such person or persons should not have notice by such documents, or either of them or otherwise, that such person or persons so intrusted as aforesaid, were not actually owners of the goods. So that the statute enabled the agent, as regarded third persons, to sell or to pledge, provided the persons with whom he pledged did not know that he (the person that pledged) was not the actual and *bond fide* owner of the property. That section was to operate in the case of a person who was dealing with an agent, not knowing him to be such, apparently as the owner. Then section 4 provided that any person might contract with any agent intrusted with any goods, &c., or to whom the same might be consigned; (not saying for what purpose, but generally with any agent intrusted with the goods or to whom the same might have been consigned), for the purchase of any such goods, and to receive the same and pay for them; and such contract should be binding upon the owner, provided such contract and payment be made in the usual and ordinary course of business, and that such person should not, when such contract was entered into or payment made, have notice that such agent was not authorized to sell the goods or receive the purchase-money. Here, although you are dealing with an agent, if you do not know that he has not authority to sell, you are perfectly safe in buying the goods.

As the law, therefore, stands, any one may safely buy of an agent if he does not know, and it is absolutely necessary that he should not, that the agent is not authorized to sell; and if the person selling is known to be an agent, then the law gives to persons accepting goods in pledge from known agents the interests of the person who makes the pledge. There is also a provision making the act of the agent, where he acts contrary to his authority, a misdemeanor; so that, whilst the legislature gives to an agent and the persons dealing with him every possible security, it does not give impunity to an agent who does a wrongful act in making a pledge or a sale, for which he had not, as between him and his principal, any authority. Here, then, there was this difficulty. The 2d section related only to purchases and pledges from agents who were not known to be such, and the 4th section to sales by agents who had not authority to sell. The 5 & 6 Vict. c. 39, was then passed, which, after reciting that, under the said acts and the present state of the law advances could not safely be made upon goods or documents intrusted to persons known to have possession thereof as agents only; and that advances on the security of goods and merchandise had become a usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bond fide* advances upon goods and merchandise as by the said recited act was given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract

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or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances *bond fide* made on the security thereof, declared, "that any agent who should thereafter be intrusted with the possession of goods, or of the documents of title to goods, should be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bond fide* made by any person with such agent, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement should be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien might have had notice that the person with whom such contract or agreement was made was only an agent." Under the 6 Geo. 4. c. 94, you might purchase from a known agent, provided "it was in the usual course of business," and that you did not know that the agent had not authority. Those two things only were necessary to give validity to a sale by even a known agent; and the late act intended to put pledges upon exactly the same footing as purchases. There is this difference between the two acts: the one says you are safe if, buying of a known agent in the ordinary course of business, you are not aware that he had not authority to sell; but the other merely recites that the pledge is in the ordinary course of business. It no longer makes it a condition that the pledge should be, but it assumes that it is, in the ordinary course of business; and for the purpose of giving title to the pledge it treats the agent as the owner.

The act says that, in dealing with any agent in the pledge of property, you may safely consider him as owner if you are acting *bond fide*, though you know he is the agent; and you are not bound to ask for his authority. It is the usual course of business to take for granted that he has authority, and if you do not know he has not authority you are perfectly safe; he shall be deemed the owner of the property and you may deal with him as such, provided you are acting *bond fide*: though you know he is the agent you may deal with him as the owner. Then comes this proviso in section 3, upon which everything turns: "Provided always, and be it enacted, that this act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bond fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malá fide* in respect thereof against the owner of such goods and merchandise; and nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt, owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bond fide* loans, advances, and exchanges as aforesaid, (though

made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods."

You may, therefore, by this act, treat any agent, whom you know to be so, as owner, in accepting any pledge of goods from him which you know to have been deposited with or transmitted to him as agent, if you are acting *bonâ fide* and have not notice that he is making the contract either *mala fide* or beyond his authority. It is assumed it will be in the ordinary course of business.

There is a different provision as regards the misdemeanor; the misdemeanor still continues, but with a very important alteration, to which I shall presently refer.

Nothing then can be plainer than the act of parliament; but the question which must arise is, what is the notice which is to bind the person accepting the pledge? Lord Tenterden, in *Evans v. Trueman*, 1 Moo. & Rob. 10, referring to the statute 6 Geo. 4. c. 94, lays it down very generally. He says: "The expression of the statute is, that a party is to be entitled to its protection, if 'he shall' not have notice, by the documents or otherwise, that the pledger was not the actual and *bonâ fide* owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge, acquired in either of these ways, is enough, I think, to exclude a party from the benefit of the provisions of this statute; slight suspicion, I think, will not." Now, that is laid down, I confess, a little too much at large; because slight suspicion is out of the question in this act. I do not say that some circumstances may not be equivalent to an actual notice; because some may be stronger than any words can express. Lord Tenterden says, "slight suspicion will not affect it." I should say that no suspicion will affect it. This was an act intended to enable general dealings between man and man in the city of London; and it would never do to say, you may deal with a man who is an agent and who, as regards you, is considered the owner, provided you will not notice he goes beyond his authority and is acting *bonâ fide*; if there is not any *mala fides* there is an end of the case. It is impossible to say that a mere suspicion, or slight suspicion, of notice can take from you the protection with which you are surrounded by this act. I think, therefore, that that is not put so strongly as it should be in favor of the pledgee.

In this case, the goods were sent by the plaintiff to Messrs. Brownrigg & Co. for sale; and it was well argued, and properly argued, that by the common law, the power of transmission for sale would not authorize a pledge. This was the very thing intended to be struck at by the act. Unless you can bring it within the proviso, it was the very thing intended to be remedied. The plaintiff almost immediately drew bills upon Messrs. Brownrigg & Co. as against his consignment, for the sum exceeding by 400*l.* what the pearls were really worth

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There is no doubt that the act under the old law would have given the pledgee no right, even if he had paid the bills, to have retained the goods; yet under the clause to which I have just referred, it is impossible not to see that the very act of drawing rendered a pledge almost necessary, unless you are to suppose that the Liverpool house could do without it. You have no right to look at the insolvency — that must be considered as a matter of accident or misfortune; it bears very hard on Mr. Navulshaw, but it has nothing to do with the law of the case. In drawing, therefore, for that great amount he did give a color to the very right to pledge in order to meet those very bills; and he drove the house, no doubt, to the necessity of pledging in order to obtain funds to meet them. If you are dealing with an agent you must take for granted that he has a power to sell in every case. The act says it has become a usual course of business to pledge, not that it was legal; on the contrary, it says that it was not legal, but it had become the usual course of business, and it meant to give legal effect to that course of business. When, therefore, you are dealing for a pledge with an agent who has a consignment, the knowledge that he has the power to sell appears to me to amount to nothing, for every agent must be supposed to have a power to sell who has the disposition of goods. What were these pearls sent over to Brownrigg & Co. for? That they might dispose of them. They have, then, the power of sale; and having such a power this act meant to give them the power of pledging in the clearest and strongest terms.

Assuming, then, that Collett & Co. knew expressly, before they accepted the bills and took the pledge, that Brownrigg & Co. had a power of sale only, even that would not alter the right; because if they had not been informed of it, they would have been considered to have known it, inasmuch as they were dealing with an agent in the possession of goods. But it wants something more than merely the right positively to sell; it wants a prohibition from the owner not to pledge. If when the plaintiff sent over the goods he had said, "I send these goods for sale, but I direct you not to pledge them," and that had been communicated to Collett & Co., I am perfectly clear that, in such a case, they could not safely have advanced their money by way of pledge; because though they might have known that Brownrigg & Co. were agents, they would have had notice that the contract was one from which they were expressly prohibited. In any other view, I do not see where the safety of the act lies. Now, if we are to speak of probabilities in dealing in a great city like this, where there are ten thousand such transactions occurring constantly, what presumption can be more reasonable than this? If a man is in possession of goods like these, and is known to possess them as agent, that he should come to your house, and say, "We have received these pearls from India (and I will suppose that he has received them for sale), and we desire you to have them valued with a view to sale." The actual deposit, it will be observed, was in clear furtherance of the directions of the plaintiff himself; for it must be presumed that the pearls were intended to be sold in London. They were accordingly valued at 2,050*l*. Brownrigg & Co. then go to Collett & Co., who

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had been in possession of the goods for nearly a month, and ask for an advance of 2,000*l*. The case was that these goods, being fancy articles, would not then meet with a ready or good sale. Now the circumstances attending that application constituted as good a security as a man could have, under this act, of the transaction being *bona fide*. It was in the ordinary course of business, and there was nothing to lead to suspicion. And, though Collett & Co. did not know this fact, Brownrigg & Co. had already accepted bills to the amount of 2,400*l*. in favor of the plaintiff, for which, of course, they would have been entitled to hold the pearls as security. The application for the loan, therefore, was, as I think, an assurance on the part of Brownrigg & Co. that they had the right to pledge; and in that view Collett & Co. had a right to deal with them as the owners of the property, dealing as they did with perfect *bona fides*.

Again, what was there to have prevented the plaintiff, when he was drawing these bills for 2,400*l*. (which sum must have been a large proportion of the value) from saying, "I shall not object to your pledging them for that sum in case you find it inconvenient to make the advance?" The plaintiff did not desire the goods to be sold at once, so much as to have a beneficial sale. Supposing therefore, a full knowledge in Collett & Co. that the goods were transmitted for sale, there is nothing to lead them to the conclusion that there might not have been a subsequent authority to pledge.

In regard to the advances and the renewal of the bills, both acts provide that an agent exceeding his authority by pledging shall be guilty of a misdemeanor; and in the 6 Geo. 4. c. 94, it is provided expressly "that the acceptance of bills of exchange by such person or persons drawn by or on account of such principal or principals shall not be considered as constituting any part of such debt so due and owing from such principal or principals within the meaning of the act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid, when the same shall respectively become due." If an agent had accepted bills in favor of the owner, he could not have escaped the penalty of the misdemeanor unless he paid them. But the latter act took a very different form; for it says expressly "that no such agent shall be liable to any prosecution for depositing goods," and so on, "in case the same shall not be made a security for, or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal and accepted by such agent." So that this latter act allows the party to bring into account, in order to save him from punishment, any bills of exchange drawn by or on account of such principal and accepted by an agent, and does not clog it with the condition that the bill shall be actually paid by the agent; so that the drawing of the bills by Brownrigg & Co., though to an amount greater than the value of the goods, would not subject them to a misdemeanor. That, I think, puts an end to the case, as regards the renewal of the bill. I am clear that the second bill was,



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in substance, a continuance merely of the original transaction, and there was nothing to alter the original advance. I see no necessity for this bill; this is no doubt a single transaction, and the plaintiff; had his remedy by action without coming here. The foundation of the bill is the allegation of fraud, contrivance, &c., and that having entirely failed, I am of the opinion that the appeal must be dismissed, with costs.

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HARRIS v. POYNER.<sup>1</sup>

July 18, 1852.

*Will — Construction — Repairs — Tenant for Life and Remainder-Man — Conversion.*

A testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust, to permit his wife during her life to receive the clear rents, issues, and profits, interest, dividends, and annual proceeds thereof, subject to all outgoings; and upon the death of his wife, then, as to all his said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely:—

*Held*, that certain leaseholds belonging to the testator were to be held by his widow in specie, no intention of conversion being expressed.

Shortly after the testator's death his widow was called upon to make good the dilapidations to the leaseholds, under a covenant in the lease:—

*Held*, that these expenses, which the widow had paid out of her income, were properly chargeable upon the *corpus* of the estate.

WILLIAM POYNER, by his will, dated the 10th of November, 1834, gave to his wife, Sarah Poyner, all his household goods and furniture, plate, china, books, pictures, prints, glass, and all other his household effects, and likewise all his wines, liquors and household stores, severally, for her absolute use. And the testator gave to his son, William Stapleton Poyner, during the life of his (the said testator's) wife, one annuity or clear yearly sum of 100*l*., which he directed to be paid out of the yearly income of his thereafter devised and bequeathed freehold and residuary real and personal estate and effects; and he subjected and charged all such estate and effects with the payment of the said annuity. And the said testator gave, devised and bequeathed his freehold messuage in Buckingham Street in the Strand, and all his real estate whatsoever and wheresoever, and all stocks in the public funds, mortgages and security for money, and all other his personal estate and effects not thereinbefore disposed of, and every part thereof, and all his estate, term and interest therein, with their respective appurtenances, unto and to the use of his said wife, and the said William Stapleton Poyner, his executrix and

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<sup>1</sup> 21 Law J. Rep. (N. S.) Chanc. 915; 16 Jur. 880.

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executor thereafter named, their heirs, executors, administrators and assigns, according to the respective natures, tenures and qualities thereof, upon trust, during the life of his said wife and her remaining his widow, to pay to or permit and suffer her to receive and take the net or clear rents and profits, interest, dividends, and annual proceeds and income of all his said devised freehold and residuary real and personal estate as aforesaid, after paying all outgoing and expenses and the annuity of 100*l.* thereinbefore bequeathed, for her absolute use; and in case his said wife should marry again, then, upon trust, during the remainder of her life, to receive and pay the said net or clear rents, profits, interests, dividends and annual proceeds and income of all his said freehold and residuary real and personal estate, after discharging all outgoing and expenses, and the aforesaid annuity, into the hands of his said wife, for her separate use; and after her decease, then, as to all his devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, of which his said wife was to have the clear yearly income, for her life (subject as aforesaid), upon trust for, and he gave, devised and bequeathed the same and every part thereof, and all his estate, term and interest therein, with their appurtenances, unto and to the use of his said son, W. S. Poyner, his heirs, executors, administrators and assigns, for his and their own absolute use and benefit forever; and he directed that the same should be conveyed as aforesaid and paid to him and them accordingly; and the said testator appointed his wife and his son, the said W. S. Poyner, executrix and executor of his said will.

The testator died on the 10th of April, 1843, leaving his widow, Sarah Poyner, and his son, W. S. Poyner, him surviving, who duly proved his will on the 9th of June following. The widow possessed herself of the household goods, furniture, and effects, and paid the annuity of 100*l.* to W. S. Poyner, up to the 24th of June, 1848, on which day he died, having made his will, and thereby devised and bequeathed all his property, estate, and effects whatsoever, both real and personal, to his wife, the plaintiff, afterwards Mrs. Harris, absolutely; and upon her marriage with the defendant Charles Harris, such property, in expectancy upon the decease of Sarah Poyner, was made the subject of settlement. The testator was possessed of several leasehold houses; but the only real estate consisted of the before-mentioned freehold house in Buckingham Street in the Strand. The leaseholds at the testator's death, were in very bad repair, and it was computed that 900*l.* would be necessary to make them tenantable. In consequence of this fact, the superior landlord gave notice to repair under the usual covenant contained in the lease, and threatened an action of ejectionment; the son, W. S. Poyner, who had managed the affairs with the advice of his mother, employed a surveyor, and contracted with a builder to execute the necessary repairs. The expense thus incurred amounted to double the net income, and it was ultimately agreed that the executors should defray these expenses by monthly payments of 20*l.* each, and in fact the whole sum was paid out of the mother's life income, she agreeing to do so to avoid the necessity of a sale. This suit was then instituted by the plaintiff,

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the widow of W. S. Poyner, for the administration of his estate, and the main question raised was, out of what estate the sum expended for repairs of the leasehold premises should come? The other question was, whether the testator had directed his leasehold estate to be converted?

*Baily* and *Rawlinson*, for the plaintiff, contended upon the principal question, as to repairs, that they were outgoings and expenses to be paid out of the income under the directions of the will. This was a claim by the landlord under a covenant to repair, and the tenant for life being in possession was the person legally liable to repair. The reversioner was entitled to have the estate free from all charges incurred during the tenancy for life, for the covenants ran with the land. In this case the tenant for life had enjoyed the estate for a considerable period, and it was for her own benefit that the repairs were executed. *Hickling v. Boyer*, 21 Law J. Rep. (N. S.) Chanc. 388; s. c. 9 Eng. Rep. 209, *Hibbert v. Cooke*, 1 Sim. & S. 552; *Talbot v. The Earl of Radnor*, 3 Myl. & K. 252, and *Bostock v. Blackeney*, 2 B. C. C. 653. It was also contended that the testator intended the leaseholds to be converted and invested in property of a permanent character.

*Walford* appeared for other parties in the same interest, and cited *Caldecott v. Brown*, 2 Hare, 144.

*Bacon* and *Baggallay*, for the widow of the testator, contended that the expense of making good the dilapidations, ought to be paid out of the *corpus* of the property, and not out of the rents, and that the testator intended this for the following reasons; that had it been otherwise, the widow would for several years have had no income and the son no annuity, since the net income of the property did not then exceed 400*l.* per annum. The dilapidations took place in the testator's lifetime; they were an immediate burden, which the landlord could have enforced by action, and to meet which, there were no assets whatever, except the premises themselves. The sale was avoided at the desire of the son, who was coexecutor with his mother, and who being entitled to the reversion, would have been prejudiced by a sale. Under these circumstances, the defendant was entitled to claim credit for the dilapidations as for any other debt which she might have paid out of the income. It was also submitted that there was no intention that the leaseholds should be converted. The rents and profits were directed to be paid to her, which was sufficient to show that she was to enjoy the estate as it was and unconverted. *Pickering v. Pickering*, 4 Myl. & Cr. 289; s. c. 8 Law J. Rep. (N. S.) Chanc. 336.

*Baily* was heard in reply.

KINDERSLEY, V. C. One question in this case is, whether that portion of the estate which consists of leaseholds ought, as between the tenant for life and the reversioner, to be converted and invested

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in property of a permanent character; that is a question of construction. After giving specific chattels to his wife, and two legatees, and an annuity of 100*l.* a year to his only son during his wife's life, the testator proceeds thus:—"As to all that my freehold messuage or tenement, with the appurtenances, in Buckingham Street in the Strand, and all my real estate whatsoever and wheresoever, my stock in the public funds of this country, mortgages and securities for money, and all other my personal estate and effects not hereinbefore by me disposed of, or wherein the absolute interest has not been given, I give the same, and all my estate, term and interest therein, with the appurtenances, unto and to the use of my dear wife Sarah Poyner, and my said only son (the executrix and executor), their heirs, executors, administrators, or assigns, according to the respective nature, tenures, and qualities thereof, on the trusts following." So far there is a gift of all the testator's real estate, and all his residuary personal estate to his wife and son upon certain trusts. He specifies a particular freehold estate, stock in the public funds, mortgages, and securities for money, but does not specify any other portion which would describe the leaseholds, according to the respective natures and qualities thereof; and the question therefore is, what are the trusts, and what property they relate to?

The trustees are, during the life of the wife, or her remaining a widow, to permit and suffer her to receive the net clear rents, interests, and dividends of all and every his devised freehold and residuary personal estate as aforesaid. So far, although it is not conclusive, there is no indication of an intention to convert. The testator meant that his wife was to have the income of the real and personal estate which he had thus given, and after paying the annuity, such rent and personal estate during the life of the wife or annuitant, for the wife's absolute use and benefit. Though the mention of the word "rents," I agree, as it was argued, might apply to real estate not leasehold, still, although I do not think it conclusive, yet I think the indication of intention was not to convert. "And in case my wife shall marry again, then upon trust during the remainder of her natural life, to receive and pay the net or clear rents, profits, interests, dividends, and annual proceeds and income of all my said freehold and residuary real and personal estate" (using the same set of words) to the wife, for her separate use, and with the usual direction that her receipt should be a good discharge; the same life interest being, in effect, given, but for her separate use. Then comes this limitation, "from and after the decease of my said wife, then as to all my said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, of which my wife is to have the clear yearly income for her life, upon trust for, and I do give, devise and bequeath the same and every part thereof, and all my estate, term and interest therein, with their appurtenances, unto and to the use of my only son, his heirs, executors, administrators and assigns, for his and their own use and benefit for ever; and I direct the same to be conveyed as aforesaid, and paid to him and them accordingly." Now it appears to me clear that what the testator considered he was giving to his son

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on his wife's death was the same property which he had bequeathed to trustees upon trust. He uses the expression, "term and interest." It was, therefore, the same estate, term and interest, he meant the remainder-man to take; the same, was that of which the income was to be enjoyed by the widow for life. It appears to me clear that the testator intended there should be no conversion. It is true that the son would have less in value because a part was wearing out, but that does not alter the case. I am of opinion, therefore, that there was no intention to convert, but the property was to be enjoyed in specie.

With respect to the other question, the testator when he died had been in possession of the leaseholds, and had suffered that property to become dilapidated, and in consequence, a sum of 900*l.* was estimated as the amount of dilapidations at his death. I must assume that the testator would have been liable under his covenant to repair, for this sum. Shortly after his death, the landlord seems to have called upon the parties to make good the dilapidations; he seems to have given some formal notice; the widow and son considered the matter, and the widow appears to have made various payments towards the amount of the dilapidations, so as to satisfy the landlord. Then comes the question, is the widow to bear that out of her own pocket; or is it to come out of the residuary estate? The question is, the testator having incurred dilapidations, whether, as between the tenant for life and a specific legatee, you can say, pay it out of the general personalty. A number of authorities were cited, but they do not govern this case; there, the questions were between a specific legatee and a residuary legatee of general personalty; but here it is as between the tenant for life and the remainder-man, of an aggregate mass, all residuary, composed of realty and personalty, of which the leaseholds in question form only a component part. It appears to me in this case, without pretending to infringe upon Lord Truro's authority, which, indeed, I should be bound to follow, were it in point; it appears to me that this is a case so entirely different, where there is a tenant for life and reversioner, under the same will, of property subject at the testator's death to 900*l.* then incurred — that upon general principle the tenant for life ought not to bear the charge. In fact, if the landlord had thought fit, he might have entered for a breach of the conditions; these parties being also executor and executrix, and having arranged that payment should be made, the result was, that the property was preserved for the benefit of the tenant for life and remainder-man. If any stock ought to be applied in payment of the 900*l.*, it is the residue.

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Attorney-General v. The Haberdashers Company, &c.

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THE ATTORNEY-GENERAL v. THE HABERDASHERS COMPANY; *In re* THE FREE GRAMMAR-SCHOOL OF NEWPORT, IN THE COUNTY OF SALOP; and *in re* THE FREE GRAMMAR-SCHOOL OF WILLIAM JONES, IN MONMOUTH.<sup>1</sup>

January 30, and May 22, 1852.

*Information — Death of Relator.*

Where all the relators in an information are dead, it is irregular and improper to proceed without having a new relator or relators appointed, and the court will restrain all further proceedings in the suit until new relators, or a new relator, shall have been appointed.

An information had been filed previously to the year 1792. By the order on further directions, dated the 22d November, 1797, a receiver of the charity estates was appointed. From that time down to the 15th January, 1839, when the last order was made, divers receivers had from time to time been appointed under orders of the court, and various other proceedings had been taken in the suit, although the relators had long since been dead. All these orders and proceedings had been obtained and taken by the parties for the time being, the successors in business of the original solicitors for the information, who appeared in such proceedings for the charity and for the Attorney-General. Upon the petition of the Attorney-General, it was declared that the appearance of the solicitors on behalf of the Attorney-General and the charity, since the decease of the relators, was irregular and improper.

THESE were two petitions presented by her majesty's Attorney-General, one in each of the above-mentioned suits. The petition in the first suit, after stating that by letters-patent of the Protector, dated the 17th November, 1656, and by an act of parliament passed in the twelfth year of King Charles II. the master and wardens of the fraternity of the art or mystery of haberdashers, in the city of London, for the time being, and their successors, were appointed governors of the possessions and revenues of the Free Grammar-school of Newport, in the county of Salop, and were thereby constituted and ordained a body corporate and politic, to be called and known by the name of "the Governors of the Possessions and Revenues of the Free Grammar-school of Newport, in the county of Salop, of the foundation of William Adams," and stating the decree on the hearing of the cause, dated the 11th December, 1792, stated, that by the order on further directions, dated the 22d November, 1797, a receiver of the charity estates was appointed, with the usual directions as to giving security and passing his accounts annually before the Master; and that by the said order it was ordered that such receiver should from time to time make the several payments on account of the said charities according to the plan specified in the Master's report mentioned, and that he should pay the same salaries, and all incidental expenses relating to the said charities, and that he should pay his balance from time to time into the bank, with the privy of the said Accountant-General, on the credit of the said cause; and that the same, when so paid in, should be laid out from time to time in the purchase of bank 3l. per cent. annuities, in the name and with the

privity of the said Accountant-General, in trust in the said cause, to answer the several purposes as therein mentioned, and such other purposes as this court should thereafter direct; and that the surplus dividends from time to time, as the same should amount to a competent sum, should be placed out in like manner. The petition then stated, that in pursuance of the said last-stated order, a receiver was appointed of the rents and profits of the said charity estates, and that receivers had from time to time been appointed, and had passed their accounts in the office of the respective Masters to whom the said cause had from time to time stood referred; that the present receiver was appointed under an order purporting to be made in the cause, and dated the 15th January, 1839; that at the time of making the said order on further directions, the solicitor for the informant was Washington Cotes, of No. 2, New-square, Lincoln's-inn, whose business was afterwards carried on under the firm of Cotes & Bateman, which firm was succeeded by the firm of Bateman & Jones, and the business of which last-mentioned firm was afterwards carried on by the said Jones alone, who afterwards took the name of Bateman, and was John Jones Bateman, and who afterwards took into partnership Rowland Nevitt Bennett; and that in the year 1839, on the appointment of such receiver, the solicitors who appeared on behalf of the Attorney-General and the charity were the said John Jones Bateman and Rowland Nevitt Bennett, whose present successors in business were a firm consisting of the said Rowland Nevitt Bennett and Benjamin Field, of No. 2, New-square, Lincoln's-inn; that the relator in the said suit had many years since, and before the appointment of the present receiver, departed this life; and that divers proceedings had been had and taken, and continued to be had and taken, purporting to be in the cause, and divers sums of money had been paid, laid out, and expended for costs, repairs, and otherwise, under orders of the court, purporting to be made in the cause; and that for many years past the passing of such accounts, and many of such proceedings, had been attended only by the said defendants, and the successors in business of the said Washington Cotes, who had acted as solicitors for the informant, and who, without any authority from the petitioner, or any of his predecessors in office, had taken on themselves to act for the Attorney-General in the matter of the said charity, and had received large sums for costs out of the said charity estate. And the petitioner prayed that it might be declared that the appearance of the said John Jones Bateman, and Rowland Nevitt Bennett, and of Rowland Nevitt Bennett and Benjamin Field, as the solicitors for and on behalf of the Attorney-General and the charity, and that the services of notices upon them as such solicitors, had been irregular and improper; and that it might be referred to the Master in whose office the cause was, to inquire and state what orders and proceedings had been made and had in the matter of the said charity for the last six years, and who had appeared as solicitors therein for and on behalf of the Attorney-General and of the charity; and what moneys had been paid for costs, and to whom, in respect of such orders and proceedings, and to state any circumstances specially with respect thereto.

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The other petition had reference to the Free Grammar-school of William Jones, Monmouth, and stated, that in that case also a receiver had been appointed by the decree in the suit, dated the 10th July, 1708, and that from that time down to the present, receivers had been appointed, who had regularly passed their accounts before the Accountant-General; that the present receiver was appointed under an order dated the 7th May, 1849, purporting to be made in the said cause; that the relators in the information had long since been dead, and that all proceedings had been taken and carried on by the successors in business of the original solicitors to the information, such successors being at the present time Messrs. Meredith, Reeve, & Co. And the plaintiff prayed to the same effect with reference to Messrs. Meredith, Reeve, & Co., as the petition in the other suit, prayed with respect to Messrs. Bennett & Field.

*W. M. James*, for the petitioner, the Attorney-General.

*Roupell*, for the respondents.

Sir J. ROMILLY, M. R. In this case two petitions were presented by her Majesty's Attorney-General — one in the matter of the Free Grammar-school at Newport, in the county of Salop, praying to this effect — “that it might be declared that the appearance of John Jones Bateman and Rowland Nevitt Bennett, and of Rowland Nevitt Bennett and Benjamin Field, as solicitors for and on behalf of the Attorney-General and the said charity, and that the services of notices upon them as such solicitors, had been irregular and improper; and that it might be referred to the Master in whose office this cause is, to inquire and state what orders and proceedings had been made and had in the matter of the said charity for the last six years, and who had appeared as solicitors therein for and on behalf of the Attorney-General and of the said charity; and what moneys had been paid for costs, and to whom, in respect of such orders and proceedings; and to state any circumstances specially with respect thereto; and that such further order might be made on such report as might be just.”

The other petition is in the matter of the Free Grammar-school of William Jones, Monmouth, praying to the same effect, with respect to Messrs. Meredith & Reeve, as was prayed in the former petition with respect to Messrs. Bennett & Field.

In this latter case the information was filed nearly a century and a half ago, and the original decree bears date the 10th July, 1708, by which a receiver was appointed of the charity estates, and these estates have from that time to the present been managed by a receiver appointed by the court, a new receiver being appointed whenever a vacancy occurred, and the last receiver was appointed in May, 1839. The relators in the original suit have, of course, long since died, and no supplemental information has been filed; in fact, the business of the estate has been carried on by the solicitors who were the successors for the time being in business of the solicitors originally employed by the



relators when the information was filed. It is not contended that any blame attaches to the solicitors who had so acted, and the counsel on behalf of the Attorney-General have disclaimed any desire to obtain a hostile order against the solicitors, who are the respondents, but they seek some declaration by the court as to the course to be pursued for the future in cases of this description, and also some order which may have the effect of putting a stop to these and similar proceedings.

When the matter was first opened to me, it appeared to me that the Attorney-General was able to remedy the inconvenience complained of without having recourse to this court, and I then referred to various passages to be found in the reports, and particularly to an expression of Lord Thurlow's, to be found in the case of *Greenhouse v. The Corporation of Ludlow*, 1 Bligh, n. s. 17, which establish, as an indisputable proposition, that the Attorney-General possesses entire dominion over every information instituted in his name, whether filed *ex officio* or at the instance of relators.

It was, however, observed on the part of the Attorney-General, that he was never informed, and did not practically, in most cases, become acquainted with the circumstance of the death of the relators, or of the continuance of proceedings in the cause so instituted in his name, and that the case before me was an instance of such being the fact, and that the Attorney-General only became acquainted with the circumstances here complained of in consequence of the rule of the court, which requires the Attorney-General to be served whenever the Master has to consider a scheme for the administration of the charity, such a reference having been directed in this case in consequence of an accumulation of income having arisen, and which could be applied only under the direction of the court. It is manifest that the course which has been adopted in this charity is open to great objection, and, unless checked, may be productive of great abuse. In the first place, a permanent office, conferring a salary on the person who receives the rent of the charity estates, is created, by which, and by the expense consequent on the annual passing of his account, the income of the charity is probably diminished to a greater extent than if the trustees themselves, or by their agents, received the rents; and the officer so constituted, though nominally appointed by the court, is in reality appointed by the trustees of the charity. Nothing has been brought to my attention in this case to show that a receiver is necessary, or why, in this case more than in the vast number of other charities in the kingdom under the control of this court, it is essential that the accounts should be annually passed before one of the Masters of the court. Assuming, however, that all this is necessary, it cannot be considered that the accounts are satisfactorily passed, when no one properly authorized on behalf of the charity attends to check them. The solicitors in this case are undoubtedly gentlemen of the highest respectability, and would watch as carefully, I have no doubt, the interests of the charity as if they were regularly retained for the purpose by the Attorney-General or the existing relator.

But the court must regard this matter wholly apart from any such consideration, and must look at the probability of any irregular or improper conduct taking place where there is no proper responsibility. Proceedings relative to charities, unless conducted by the Attorney-General *ex officio*, and by the solicitor regularly authorised, attending for that purpose, are required by the court to be conducted in such a manner as that some persons may be responsible, under the orders of the court, in costs for improper conduct. All such responsibility ceases if cases like the present should be permitted to continue. These very instances, and these very objections, evidently occurred to Lord Thurlow, and were referred to by him in the month of May, 1791, when he is reported, 1 Ves. jun. 295, to have observed, in the very case before me, namely, the case of *The Attorney-General v. The Haberdashers Company*, on the impropriety of keeping these informations alive for ever. His lordship is reported to have said in that case, "As to the execution of the trusts," (it is to be observed, this is the very identical case now before me,) "it is not to be kept under the direction of the court, to be executed by the court from time to time, but it is to be executed under a general direction to the trustees, which is the only way of administering a charity. Then the first thing they are to do is to repair, which must be *sub arbitrio bonorum virorum*. If the trustees misbehave, there must be another information upon the new ground. I cannot keep this information here forever. I know these applications to the court are very expensive, and for that reason I want to get rid of them."

It is singular to observe how utterly fruitless the observations of Lord Thurlow were in this particular case. I have certainly felt considerably embarrassed as to the course proper to be taken in this case; nor do I see, particularly after the experience of Lord Thurlow's observations, how any direction or order which the court may make in one individual case can have any effect or control over the proceedings in other suits in which a similar course of proceeding may now be in operation. To effect that purpose, some general order of the court would probably be necessary, which might regulate or prevent proceedings in these cases of such great antiquity. What I can do in the present case to prevent this practice from continuing I shall do; but this will, as I have already stated, I apprehend, have a very limited effect. I shall, at the instance of the Attorney-General, declare the appearance of the solicitors on behalf of the Attorney-General and the charity, since the decease of the relators, irregular and improper, and that the services of notices on them as such solicitors have been since that time, and are now, irregular and improper. I do not impute the slightest blame to them for having acted according to what appears to have been an existing, though in my opinion irregular, practice. I shall, of course, make no reference to the Master, according to the latter part of the prayer of the petition, and which part is, in truth, not asked for by the Attorney-General; but if the Attorney-General requires it, I will, on the petition being amended for that purpose, make a further order, restraining all further proceedings in the suit on behalf of the Attorney-General, or, on behalf of the

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charity, except as he shall direct, or till new relators shall have been duly constituted. The observations I have made with respect to one of the petitions applies equally to the other, and the same order must be made on both petitions. I shall make no order as to costs, except that the Attorney-General may be permitted to have his costs out of the charity estates.

*James.* On behalf of the Attorney-General, I think that that declaration will answer the object we have in view. The only object of the Attorney-General was to call the attention of the court to the practice.

*Roupell.* Does your honor think the parties should not have their costs out of the charity estates? The Attorney-General disclaims anything like a personal imputation.

Sir J. ROMILLY, M. R. If the Attorney-General does not object, and it is understood they do not intend to resist what I think right in the matter.

*Roupell.* I cannot conceive it possible.

Sir J. ROMILLY, M. R. I do not like to make any condition on the subject. I will, then, order the costs, because I think it is a common mistake. I will order the costs of all parties to come out of the charity estates.

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FLINT v. WOODIN.<sup>1</sup>

March 16 and April 15, 1852.

*Vendor and Purchaser — Description — Puffer — Owner acting as Auctioneer.*

Where copyhold premises had been let on lease in 1793, and rent had been paid and the possession gone up to the time of the sale, according to the terms of the lease, it is not such a misdescription as will induce the court to refuse to enforce an agreement, if the premises be described as subject to a lease containing the usual covenants, although the original lease had been lost, and there was no evidence to show who was now liable under the covenants.

There is nothing fraudulent in the mere fact of an owner of property acting as auctioneer at a sale.

A puffer who bids by degrees up to his limit, instead of making his utmost bid at once, is not acting in fraud of the *bonâ fide* bidders.

THIS was a claim for specific performance of an agreement for the purchase of three copyhold houses and premises, numbered 16, 17, and 18, Hamilton-row, Bagnigge-wells-road, forming lot 5 of a printed particular of sale, which were put up for sale by auction on the 12th August, 1851. The defendant, Woodin, attended, and was de-

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<sup>1</sup> 16 Jur. 719; 9 Hare, 618.

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clared the highest bidder for, and the purchaser of, the same, at 700*l.*; and by an agreement with Mr. Flint, dated the same day, Woodin declared himself the purchaser, and paid the sum of 140*l.* for deposit. The claim then stated that various applications had been made to Woodin to complete the contract, but that he had always declined; and it prayed a specific performance of the agreement, with the usual directions. By the affidavits of the plaintiff and his solicitor, and of the solicitor's clerk, it appeared that in the particulars of sale the property was described as "a desirable copyhold estate, consisting of three houses," &c., "with early reversion to a considerably improved rent;" and to the description was added — "This desirable estate is let upon lease, containing all the usual covenants to keep in repair, &c., at a ground-rent of 18*l.* per annum, for a term which will expire at Christmas, 1852, when 70 guineas per annum may readily be had."

The abstracts were duly delivered, and some objections were taken and requisitions made, but the only one necessary to be mentioned was one calling on the vendor to show who was now the lessee or assignee of the lease referred to in the note at the foot of the particulars of sale, inasmuch as, the premises being out of repair, the purchaser wished to know against whom he could go on the covenants to repair.

The defendant filed an affidavit, in which he deposed that he called on the plaintiff on the 7th August, 1851, upon other matters, and that in the course of conversation the plaintiff directed the defendant's attention to the particulars and conditions of sale, and recommended the purchase: that the defendant therefore looked at the particulars, and consulted the plaintiff as to the price at which the property would probably be sold, and inquired whether it would probably fetch more than 700*l.*, to which the plaintiff replied, that it possibly might, but that he did not think it would be sold at less: that the plaintiff then recommended the property in very strong terms, and advised the defendant to purchase, and said that it would be cheap at the above price; and that, in answer to an inquiry why the vendors wished to sell, the plaintiff said that the property was situated in a part of the town distant from where their other property lay, and that he understood that was their only reason for parting with it: that, relying on such representations, the defendant attended the sale, and bought, at 700*l.*: that the plaintiff acted as auctioneer, and there was little competition, and that the plaintiff offered to obtain the necessary conveyances to the defendant for 5*l.*, which was declined: that the defendant's solicitor informed him on the 27th September, 1851, that the title was not in a satisfactory state, and that there was no sufficient evidence of the existence of any subsisting lease, and that the defendant was then first informed of the fact of the plaintiff being the owner of the premises: that the defendant did not see the premises until the end of October, 1851, and then only the outside, and that in the following month he was informed by a surveyor that the repairs would cost 200*l.*

The affidavit stated that Flint concealed the fact of being the owner,

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and that the defendant was thrown off his guard, and relied more implicitly on his statement than he would have done had he known that Flint was the owner, and not the auctioneer only: that he considered and treated Flint as auctioneer only, and, not suspecting him to be the owner, considered his representations as only those of an agent, and took his advice in that character, and therefore neglected to make such inquiries as he would have done, as to the state and condition of the property, had he suspected Flint to be the owner. The affidavit then stated the defendant's belief that the auction was not conducted *bond fide*, for that some of the biddings were not real: that the plaintiff is unable to prove that the biddings were *bond fide*: that the auction was conducted by the plaintiff with an unfair advantage, being aware, from the conversation of the 7th August, that the defendant was willing to bid up to 700*l.*, and that the reserved bidding had been fixed, in consequence, at 695*l.*; and that the defendant immediately after the sale told the plaintiff, he, the defendant, would not have bid another 10*l.* beyond the 700*l.* Part of the affidavit of one of the firm of the defendant's solicitors was to the effect, that on the 13th March, 1852, the defendant expressed his willingness to complete, if he could be advised that a good title could be made, and that a letter was that day written to the plaintiff's solicitor offering to have a re-sale, each party to bear half the loss, if any, but that if a gain were made, the whole to belong to the plaintiff, or that the plaintiff should allow a deduction of 5*l.* per cent. off the purchase-money. The plaintiff filed an affidavit in reply, in which he denied that he recommended the property to the defendant, and he swore that he told the defendant that it was uncertain what the property would fetch: that the reason for the property being sold, namely, that the proprietor had no other property in the same neighborhood, was in accordance with the fact: that there were thirty persons at the sale, and that there was a very fair competition, and there were at least four *bond fide* bidders, including the deponent: that he did not offer to get the conveyance done for 5*l.*, but said that his solicitor would probably not charge much above 5*l.* for it: that it is not unusual for auctioneers to sell their own property, and that at the sale only one person was employed to prevent a sale below the value, the amount of the reserved bidding being 695*l.*, and that there were twenty-five biddings at the sale. He denied that the defendant ever told him he would give, or was disposed to give, 700*l.*, and he deposed that he believed the property to be worth 800*l.*, and that he would not have sold it for less than 700*l.* by private contract, and that the present worth was nearly 70*l.* a year.

*Sir W. P. Wood and Boyle*, for the claim. The defendant cannot insist on having it shown to him who is now the person entitled under the lease. The rent is regularly paid by the occupier, and is more than was stated. There is no suggestion that the plaintiff made any fraudulent misrepresentation as to the existence of a lease. An auctioneer is surely not to be forever precluded from selling his own property. The plaintiff's affidavits displace the defendant's statements

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as to a conversation having passed, in which the defendant said he would bid up to 700*l*. But if this conversation actually took place, it is not insinuated that the plaintiff obtained any information by any fraudulent misrepresentation: he would have, therefore, as good a right to make use of any information which came to his knowledge as if he had been merely auctioneer, and not also the owner. In that case, it obviously would have been his duty to the vendor to obtain as large a sum as possible, and to see that a reserved bidding was fixed, so as to prevent a sale below 700*l*. But the whole of this ground is denied, for no such conversation took place. So as to puffers, there was only one puffer, which is perfectly lawful.

*W. T. S. Daniel* and *Smale*, for the defendant. Unless the plaintiff can show in whom the lease is vested, so as to enable the defendant to enforce the covenants for the repairs, the court will not enforce the specific performance of the agreement. The auctioneer being himself the vendor gives him an unfair advantage over the defendant. The defendant was thrown off his guard by the recommendation of the plaintiff that the property would be cheap at 700*l*. Believing in that statement, he did not inspect the premises till long after the sale; the dilapidation is, therefore, a surprise on the defendant. No abstract which has yet been delivered shows the existence of the lease. There has, therefore, never been any complete abstract. *Hobson v. Bell*, 2 Beav. 17; *Blacklow v. Laws*, 2 Hare, 40; *Symons v. James*, 1 Y. & C. C. C. 487; s. c. 6 Jur. 452. The auctioneer is considered as a mere stake-holder, and if he be more, that is, if he be himself the vendor, he ought to disclose it.

*Sir W. P. Wood*, in reply.

April 15.—*Sir G. Turner*, V. C. The questions in this case arose on a claim for specific performance of a contract for the purchase of certain houses in Bagnigge-wells-road. The purchaser takes three objections to the claim, the first of which goes to impeach the title of the vendor; the other two impeach the validity of the contract itself. It is objected, first, that there is no person to answer and perform the covenant contained in a lease, which was in existence, of the property sold at the sale; secondly, that the vendor was himself the auctioneer at the sale, unknown to the purchaser; and, thirdly, that there was a puffer employed at the sale, also without the knowledge of the purchaser. As to the first objection, the property, when put up for sale, was described as property held subject to a lease. It is not the leasehold interest, but the reversion which was sold. The property is described as being a "brick-built house of copyhold tenure;" and the description goes on to say, "This desirable estate is sold subject to a lease, containing all the usual covenants to repair, at a ground rent of 18*l*. per annum, for a term that will expire at Christmas, 1852." Now, I agree to the position, that if a vendor puts up the property for sale, describing it as being let on a lease, containing all the usual covenants to repair, knowing all the while that there is

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no person who can be liable upon the covenants in the lease, that might well be considered as a false representation on the part of the vendor; for representations that the lease contains all the usual covenants to repair are apt to lead the purchaser to conclude that those covenants will be duly performed. If the vendor knows at the time that the covenants in the lease cannot be enforced, that may be a ground for the court to refuse to interfere to enforce a specific performance of the agreement for sale. But that is a case to be made out on the evidence. How do the facts of the case stand? A counterpart is produced of the original lease, granted in 1793; the rent under that lease has been received, and there are two persons now in possession of two of the houses comprised in and demised by that lease, and paying the rent. In such a state of things I cannot possibly hold that the representation made by the particulars of sale, namely, that these houses are subject to a lease containing the usual covenants, is anything like a fraudulent misrepresentation, such as would lead the court to refuse a specific performance of this agreement. The purchaser might have made inquiries of the occupants of the houses concerning the extent and nature of their duties, if he had considered it important to do so, or had considered that to be a material ingredient to be taken into account in determining what price he would bid for them.

The second objection is, that the vendor himself acted as auctioneer at the sale, the purchaser not being then aware who was the real owner of the property sold; and the objection is put on this ground, that the auctioneer is at such a sale the agent of the purchaser, and that the vendor cannot, except under very extraordinary circumstances, act as the agent of the purchaser. It is quite true that the auctioneer is the agent of the purchaser at a sale, but he is not his agent for all purposes. The auctioneer, as it seems to me, may properly hold the character of owner without any objection being taken to the sale on that ground. But if any objection could rest on that, under ordinary circumstances, the subsequent transactions completely prevent the defendant from urging it in this case. For what took place here? The sale taking place on the 12th August, the abstract was placed in the hands of the purchaser's solicitors on the 21st, which gave them the fullest notice that the auctioneer was himself the owner and vendor. The case does not rest there: in September distinct notice comes to the defendant himself personally that the auctioneer was the owner. In such circumstances, if the purchaser meant to rely on the objection, he ought to have raised it at once, and stated it as an objection on which he meant to insist; and not having done so, I think that objection, if any, must be taken to have been waived. I consider that a purchaser, knowing of an objection of this description to the validity of a contract, cannot lie by, and afterwards attempt to avail himself of it. The instant that a party is aware of an objection of this nature, he is bound immediately to insist upon it, if he intends to rely on it at all. He cannot at one time treat the contract as subsisting, and then afterwards turn round and say there never was any contract at all.

The last objection was, that a puffer was employed at the sale.

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At an early part of the argument I much considered the question whether the fact of there being a person bidding through the long series of biddings down to the final close, might not affect the case. I was rather struck at the time with the view of the Master of the Rolls in the case of *Smith v. Clarke*, 12 Ves. 483, where he says, "A bidder cannot be employed to screw up the price, or take advantage of the ignorance of the bidders." We must, to apply this rule, first determine the question whether the bidder was employed to screw up the price, or take advantage of the ignorance of bidders. I cannot draw this inference merely from the fact of his having bid against a *bond fide* bidder through a long series of biddings. For it is not to be expected that when a person is employed to bid for property up to a certain sum, say 700*l.*, he is to bid at 695*l.*; he would rather bid gradually up to 695*l.*, and if, after that, no *bond fide* bidder offers against him, that fact alone should not lead to the conclusion that he is screwing up the price, or taking advantage of the ignorance of others. Then it rests on this — Mr. Smale says the reserved bidding was fixed with a knowledge that there would be a sum of 700*l.* bid for the houses, it having been ascertained that the defendant was likely to bid that sum, and that it was fraudulent to force it up to that price by a person who was not a *bond fide* bidder. Looking to the affidavit of the defendant on this point, I find no more than this, that he having gone to the plaintiff, the auctioneer, upon other business, namely for the purpose of receiving rent for other property with which he was concerned, asked him some questions about this property, the subject of the then impending sale, and inquired what he thought the premises in question would be sold for — whether they would be sold for about 700*l.*? To which the plaintiff (the vendor) replied that he thought it possibly might, but he did not think it would be sold for less than that sum; and that the plaintiff then recommended him in strong terms to purchase, and said he would find it cheap. This was on the 7th August; the sale did not take place until the 12th, and yet in that interval this gentleman does not go to look at the property, or make further inquiry, but he relies on the representation so made. Now, there was no objection at that time; he merely makes the inquiry, will it sell for 700*l.*? Is it a fraud if a vendor, being also the auctioneer, when a party comes to him and makes an inquiry whether the property will be sold for 700*l.*, claims to fix the reserved bidding at that sum? I think not; it was open to the purchaser to make inquiries. I think upon these grounds I cannot refuse to make a decree for specific performance of the contract; and though I have had some doubt on the point of costs, I think I cannot do justice unless I give costs against the purchaser.

Decree specific performance; and as the question of title has been submitted to the court, and the court being of opinion that there is no valid objection to the title, there must be a decree for specific performance, with costs; and there must be a reference to the Master to settle the conveyance, if the parties differ.



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*Ex parte* Crosfield; *In re* The North of England Joint-stock Banking Co.

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*Ex Parte* CROSFIELD; *In re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.<sup>1</sup>

June 1, 1852.

*Joint-stock Companies Winding-up Acts—Waiver of Formalities by Directors—Contributory—Executor—Master's Jurisdiction to Review.*

The decision in this case, 15 Jur. 479; s. c. 4 Eng. Rep. 125, affirmed.

By a clause in a joint-stock company's deed it was declared that the executor of a deceased shareholder should not be entitled to receive future dividends, but that they should remain in suspense until some person should become a member of the company in respect of those shares. For several years after the death of a shareholder, the company paid the dividends to A, the first of two executors named in their books as the executors of the shareholder, but none of the formalities necessary for making A, individually, a member in respect of these shares had been complied with:—

*Held*, that the company were not to be considered as having accepted A, as a member in respect of these shares, and that B, the other executor, was still liable to contribute as one of the personal representatives of the deceased shareholder.

*Held*, also, that the 17th section of the Winding-up Amendment Act, 1849, (12 & 13 Vict. c. 108), is retrospective as well as prospective, and that the Master had power to review a decision which he had made prior to the passing of that act.

THIS was an appeal from an order of Sir J. L. Knight Bruce, late Vice-Chancellor, refusing the motion of James Crosfield that his name might be removed from the list of contributories to the above company as one of the personal representatives of Ann Hall, deceased. The facts were, that Ann Hall, being the proprietor of thirty shares in the above company, by her will, dated the 19th November, 1829, bequeathed the residue of her personal estate (which included these thirty shares) unto and equally between her son, Richard Hall, and her daughter, Rebecca Hall, and appointed her said son and the said James Crosfield her executors. She died in December, 1838, and her will was proved by both executors in April, 1839. From the share ledger of the company it appeared that probate of Ann Hall's will was produced at the company's office, according to the provisions of the deed of settlement, on the 9th March, 1840, and the names of Richard Hall, her son, and James Crosfield, were entered therein as executors. All subsequent dividend warrants were made out in favor of Richard Hall alone; and all notices of matters of business were sent to Hall alone, not in his character of executor, but individually. Some of these letters are set out in the previous report of this case, 15 Jur. 480; s. c. 4 Eng. Rep. 125. Crosfield, in his affirmation, stated that shortly after the decease of the testatrix, the other residuary property so bequeathed by her will was pursuant to the directions therein contained, converted into money, and the proceeds, after payment of her debts, &c., divided equally between the said Richard Hall and the said Rebecca Hall; and the certificates of the said thirty shares were, in the year 1839,

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<sup>1</sup> 16 Jur. 731.

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given up to the said Richard Hall, for the purpose of being sold and disposed of in like manner, but that the said Richard Hall declined to sell the said shares, alleging that the same were then at a discount. That the said Richard Hall produced the probate of the said will at the office of the said company, for the purpose, as he believed, of having the said shares transferred from the name of the said testatrix (in which they were then standing) into his, the said Richard Hall's own name, and that such transfer, as he had always understood and believed, was made accordingly, he, the said Crosfield, never having done any act signifying his acceptance of the said shares, or been applied to to take the same. That all the executorship accounts, and all cash transactions relating to the estate, were finally settled and wound up in the month of June, 1840; and that he ceased at that time to act in such character of executor. It appeared from the documentary evidence, that in October, 1845, Hall alone sold fifteen of these shares, and that he alone executed the deed of transfer; but it appeared that by the 11th article of the deed of partnership it was provided, that "whenever any shares shall be or become vested in two or more persons jointly, such one of the same persons whose name shall stand first in the books of the company as one of the owners of such shares shall be considered and deemed the sole and absolute owner thereof for all the purposes of voting and acting as a shareholder." The other articles of the deed of partnership that were relied on in the argument were the 28th, 29th, and 30th:—

28. "The husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent debtor possessed of shares, shall not be a member of the company in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively, but such assignee of a bankrupt or insolvent debtor shall sell and dispose of such shares in manner and subject to the provisions hereinbefore expressed and contained with respect to the sale and transfer of shares; and any such husband, executor, administrator, or legatee as aforesaid shall be at liberty either to sell and dispose of the shares so vested in him, in like manner and subject as aforesaid, or at his option to become a member of the company in respect of such shares, on complying with the provisions of these presents, as next hereinbefore expressed in that behalf."

29. "The husband of any female shareholder, or the executor, administrator, or legatee of a deceased shareholder, who shall be desirous of becoming a member of the company in respect of the shares vested in him in any of such capacities respectively, shall give notice in writing, at the banking-house of the company in Newcastle-upon-Tyne, of such his desire, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon, and upon otherwise complying with the provisions of the deed of settlement, he shall be admitted and

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become a member of the company in respect of such shares, and have the same transferred into his name accordingly, and shall be personally charged with the duties and liabilities incident to the ownership of the same."

30. "The husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, who shall not, under the provision lastly hereinbefore contained, elect to become a member of the company in respect of the shares vested in him in any such capacity, and also the assignee of every bankrupt or insolvent debtor possessing shares, shall be entitled to receive any dividend which shall have become due on the shares so vested in him in any such capacity as aforesaid before his title to the same shares accrued; but no dividends which shall become due on the same shares after his title shall have accrued shall be payable to or demandable by him, but shall, till some person shall have become a member of the company in respect of the same shares, remain in suspense, and shall not be paid till the transfer thereof shall be completed, and the new holder thereof shall claim the same; and every transfer shall carry with it the profits and interest, and share of capital and surplus of guarantee fund in respect of the shares transferred, so as to close all the right and interest of the party or parties making such transfer in respect of such transferred shares."

The Master's certificate in this case is set out in the previous report, from which it appears that on the 22d December, 1848, the Master, in settling the list of contributories, included the name of Richard Hall as a contributory personally responsible for fifteen shares, and excluded the name of James Crosfield; but that on the 26th of February, 1850, upon reviewing his settlement of the list, he included the name of James Crosfield as a contributory for fifteen shares, as one of the personal representatives of the testatrix, Ann Hall.

*James Russell, W. T. S. Daniel, and Randall*, in support of the appeal. The company have ever since the death of the testatrix treated Hall as the owner of the shares, communicating with him alone, and paying him the dividends, not as executor, but individually; and unless the company had accepted him as the owner, these dividends ought to have remained in suspense, according to the 30th article of the deed of partnership. The company have, in fact, done acts which would have been wrong, unless upon the understanding that Hall was a member of the company; and they have omitted to do acts which they ought to have done if Crosfield was a member. The directors cannot say that the payments to Hall were illegal, if, by any construction of the deed and of their conduct, they were lawful payments; and here he was clearly treated as a member of the company, and as beneficially entitled; and it must be assumed that, as executor, he had assented to the legacy for his own benefit. The directors, therefore, cannot now say that they have not accepted him as the real owner. [They referred to *Ex parte Doyle*, 2 Hall & T. 221; *Nelson's case*, 16 Jur. 453; and *Ex parte Hamer*, 16 Jur. 555; s. c. 11 Eng. Rep. 257; They secondly contended, that the Master having, in the first in-

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stance, removed Mr. Crosfield's name from the list of contributories, that decision was final, and that the Master had no jurisdiction to review his decision; submitting that sect. 17 of the 12 & 13 Vict. c. 108,<sup>1</sup> (the Act to mend the Joint-stock Companies Winding-up Act, 1848), was not retrospective, and that the words "which may have been made" were fully satisfied by the nature of the very thing; for that in every case under that section some order or proceeding must have been previously made by the Master; relying upon Lord Cranworth's decision in *Best's case*, 1 Sim. (N. S.) 193; s. c. 1 Eng. Rep. 197; and further submitting, that the 27th section of the 12 & 13 Vict. c. 108, did not give any new power of including a person in the list of contributories who had been once excluded, unless in respect of "any other share or interest in the company."

*Bacon* and *J. V. Prior*, for the official manager, referred to the 11th section of the deed of partnership, and also to various letters from Hall to the company, in which he spoke of the shares "standing in his name as executor of Ann Hall," and of "dividends due to the estate of Ann Hall," &c. And as to the question whether the 17th section of the act of 1849 was retrospective or not, they referred to the previous report of this case, 15 Jur. 480; s. c. 4 Eng. Rep. 125, where upon *Best's case* being cited, Sir J. L. Knight Bruce, V. C., stated that he had communicated with Lord Cranworth, and that he had informed him that he decided in *Best's case* that the Master had not jurisdiction, because the matter had previously come before him, Sir J. L. Knight Bruce.

*J. Russell*, in reply. The question is, whether the 17th section is to be read as relating to past events, with reference to the date of the act of parliament, or to the date of the particular decision of the Master. If it is to be read with reference to the date of the act of parliament, then the act must be purely retrospective and not at all prospective. The 27th section, coupled with the 17th, strengthens our case. A contributory had not the power, under the original Winding-up Act, to bring a party a second time before the Master; but then the 27th section of this amending act gives him the power as to other shares or interest; so that it is clear, that if a contributory had tried to put Crosfield on the list in respect of these shares, he could not do so. How absurd, then, would it be to hold that the official manager may have him put on the list, although a contributory cannot.

LORD CHANCELLOR, (Lord St. Leonards). I very much regret being compelled to decide this case against Mr. Crosfield. It is a very hard case; he has been guilty of no misconduct of any sort or

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<sup>1</sup> That section is in these words:—"And be it enacted, that it shall be lawful for the Master from time to time to reconsider and review any order or proceeding which may have been made by, or may have taken place before him under the said act, upon such terms and in such manner as he thinks fit."

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*Ex parte Crosfield; In re The North of England Joint-stock Banking Co.*

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kind, and he is visited, at a distance of some years, with a considerable infliction that ought not to fall on him; but I am afraid the rule of law is too strong for me. The first point which is made against his liability is upon the act of 1849, and it is insisted that the power there given to the Master is not retrospective, and that, at all events, I must decide whether it be altogether retrospective, or altogether prospective; and that it cannot be both. Now, from that view I entirely dissent. I think the words are clearly retrospective; but then I think the words very naturally and easily bend to the clear intention of the legislature, and would be prospectively applicable to the then future event. A past event has already taken place to which the words will apply. A future event will by and by take place, which will then be a past event, to which the words will clearly apply. I cannot think there is any doubt upon the retrospective operation of the words, grammatically considered. Now, it is clear what the intent of the act was; there had been a great number of cases in which the Master, according to the recent decisions of the court, had miscarried, and, according to the decisions of the higher authorities, it was not possible to review those cases; they who had a right and were bound to decide whether the construction of the Master was right or wrong, did, according to their view, decide that the conclusion to which the Master had arrived was wrong, and required correction, and that it could only be corrected under an act of parliament. It is said that the 17th section of the Winding-up Amendment Act, 1849, is entirely inconsistent with this construction. But it does not appear to me to be so; that section gives a power to the Master, and that power, therefore, being given to an officer of this court, it was no doubt considered that it might be entrusted to him with greater latitude than could be given to a co-contributor, as by the former act of 1848 that power was given in this very case; for example, where one party had been included and another excluded by the Master, so that there could be no longer a power to vary that order, still the act of parliament of 1849, even in the case of a contributor, went as far as to say, that the contributor might bring a co-contributor before the court, although he had been included or excluded under the old act, in respect of any shares which had not been brought forward for adjudication in the former instance.

The next question is, whether I can hold that the acts which have taken place between the company and Mr. Hall, one of the executors, varies the right of the company, or of the official manager as representing it. Now, the shares in question belonged to Ann Hall, and they are entered regularly in the books of the company in her name, and she by her will gave them to her daughter and son. Richard Hall was one of the legatees, and he and Mr. Crosfield were joint executors. Mr. Crosfield does not appear to have taken an active interest; he says he wound up all the executorship affairs years ago, except with reference to these thirty shares, and that he considered he had nothing further to do in regard to those shares. Now, as regards the winding up, the winding up is all very well as between the co-executor and the legatees, but it had not the slightest bearing

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*Ex parte Crosfield; In re The North of England Joint-stock Banking Co.*

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against persons who were entitled to come in as creditors against the assets. Unfortunately Mr. Crosfield was in a predicament which too often happens to a man proving and acting as executor, but trusting (as he ought not to have done, for his own sake) to the acts of his co-executor, for which he might be made and clearly is liable, and yet not looking after his co-executor, or seeing how he executed his duties. Now, Mr. Crosfield, on the death of the testatrix, having proved the will, became liable, as I have said, in all respects, and he subsequently acted. When the probate was carried into the office of the company, there is a very proper entry, still under the original name of Ann Hall — "Probate, &c. of Ann Hall's will exhibited here on the 9th of March, 1845; Richard Hall, her son, and James Crosfield, executors; dated the 9th of December, 1839;" and with that entry is a memorandum where Mr. Crosfield lives. That therefore gave them a right, as executors, to deal with the shares according to the provisions of the deed.

Now, one great point which has been made, and the leading point, on the part of the appellant, is this, that by section 30 of the deed constituting the company, no executor would be entitled to receive the profits of the share of his testator until he should have become a member, but that those profits should be kept in suspense, accumulating; and then it was said, first, that a great damage had accrued to Mr. Crosfield because the money had not been kept in suspense, for had it been so, as it ought to have been, it would have gone to answer, in a great measure, the liability, if any, of that gentleman; and, secondly, that it showed that Mr. Richard Hall had been accepted as a member of the company, and that they were bound by that acceptance.

In the first place, I have held, and am prepared to hold again, that directors may do acts binding upon the whole body, by which they waive certain formalities which they ought to have executed in regard to the transfer of shares. *Ex parte Straffon's Executors*, 16 Jur. 435; s. c. 10 Eng. Rep. 275. But in this case a privilege has been conceded to one of two executors; one executor may act — one executor is entitled to receive, and therefore there is a privilege and a benefit to both of the executors. If Mr. Crosfield had chosen to have availed himself of it, it would have enured to both. It might be considered, therefore, to have been received by both, and it was a benefit, and not a burthen. But Mr. Crosfield could have got no benefit if the money had been there, because the latter part of the clause, which has not been adverted to, declares that the money shall "remain in suspense, and shall not be paid till the transfer thereof shall be completed, and the new holder thereof shall claim the same, and every transfer shall carry with it the profits and interest and share of capital," and so on; the consequence of which is, that if it had been accumulated as is here directed, it would not have been, unfortunately, a fund in hand for the benefit of Mr. Crosfield, but it would have been a fund really in suspense — nominally ready, not for him, but for the person who bought the share; and as the shares are worth nothing but waste paper, and of course

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*Ex parte Crosfield; In re The North of England Joint-stock Banking Co.*

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wholly unsalable, they would not bring any benefit, but would impose a great burthen; that money, if it had remained in suspense, never could have been a benefit to Mr. Crosfield, or anybody else; so that it cannot be said that Mr. Crosfield sustained any loss, but might have had a benefit.

Then the question is, can this admission on the part of the directors be held to be an admission of Richard Hall, in his own proper person, as a member and the owner of this property? Now, the will does not give him any right so to make himself owner of the property. I do not see myself any very clear direction in the deed of what is to be done in a case of several executors—whether you are to take those early clauses, and say the first is entitled to be a member, which I think is doubtful, or whether you must not resort to those other clauses, which I apprehend is the true construction, and say that they must all be members, and that no other course is left for them. However, without deciding that, am I to consider this act, so relied on, as an admission of this gentleman, supposing he could be admitted? Clearly I cannot consider it so, because every act I have before me shows a direct contrary dealing with that gentleman. He never asked to be a member, in the proper character of a member. When he sold the fifteen shares, the notice he gave was as executor. When he wrote those letters—not in every one, but in two out of three—he speaks of the shares as those of Ann Hall. In all the documents I have before me there is not one in which he is introduced as a member. In every single instance the credit is given for the dividends to the executor; and although that is discharged on the opposite side by the payment to him, yet of course it must be in that character in respect of which, on the opposite side, the credit is given to him.

I must say I never saw a case in which there was less foundation for the argument, that the dealings between the parties had altered the right that existed between them. I have looked with the greatest care and anxiety to see if I could find anything of the sort—for I have been anxious to relieve Mr. Crosfield if I could—but there is nothing of the sort in any part of the dealings, or any one of the documents. Well, then, the clause referred to by Mr. Prior, at the end of the deed, (clause 103), shows that these parties cannot have been taken by surprise in this respect, for there is an actual independent covenant by the shareholders, binding their real and personal representatives, that they shall continue liable in respect of any shares that form part of their assets. Why was that introduced? Because the executors *quid* executors, not becoming members, and not having sold, would not themselves be responsible personally, as has been decided in the cases that have been referred to, and properly decided, and as I have since decided; and therefore they must be assumed to have been perfectly aware, as members, that until they sold, and other persons came in their place, there would be no personal responsibility. The original shareholders entered into covenants, that their real and personal assets should be considered liable for all the conditions under the deed which would attach to any shareholder whilst the shares

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Cambray v. Draper.

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remained the assets of the particular shareholder. This is a case, unfortunately, with a good deal of merit, but without any law. It is too clear to entertain any doubt about it, and therefore I am under the necessity of affirming the decision of the Vice-Chancellor. But this really is so hard a case, that I shall not do what I consider myself bound to do in most cases where a party has no merits, and chooses to try an experiment in which he cannot succeed. In such a case I should feel bound to dismiss the appeal with costs, but this is an appeal that I shall not dismiss with costs. I think it is a hard case on Mr. Crosfield, and I am not surprised at the attempt made to relieve him from such an unmerited hardship.

*Appeal dismissed without costs.*

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CAMBRAY v. DRAPER.<sup>1</sup>

June 4 and 6, 1852.

*Executor — Indemnity — Costs of Executor Defendant.*

The testator left the bulk of his property (all personal) to his wife, after a few pecuniary legacies. The testator left a large contract for wheat incomplete at his death, and was the personal representative of his deceased father's and brother's estates, in respect of which there were still unsettled claims. The executors paid the small legacies; but, before paying over anything to the widow, required, as an indemnity, to have a large portion of the residue impounded for twenty years. The widow, first agreed, but afterwards withdrew her consent, and filed this bill for administration, and payment over. No additional claims were established either in respect of the wheat or the estates which the testator represented, or otherwise:—

*Held*, that though the period of twenty years was too long to ask to have the indemnity fund impounded, yet that the executors, the defendants, were entitled to their costs.

THE bill in this case stated that Philip Cambray, by his will, dated August, 1846, after certain pecuniary legacies, bequeathed and devised all his personal and real estate to his wife (the plaintiff) absolutely, and appointed the plaintiff and defendants his executrix and executors, who duly proved the said will. The plaintiff died on the 9th August, 1848, and the bill alleged, that by the month of November in the same year the legacies and debts and funeral expenses, amounting to several hundred pounds, were all paid, and the whole estate completely administered, except as to the payment of the residue, alleged to amount to between 4000*l.* and 5000*l.*, to the plaintiff. The defendants refused to pay over the balance, except on the terms of having 1000*l.*, part thereof, invested as an indemnity fund in the joint names of the plaintiff and themselves. This sum being invested accordingly, the defendants still declined to pay over the balance until their accounts had been examined by a professional man on

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<sup>1</sup> 16 Jur. 735.



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*Cambray v. Draper.*

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behalf of Mrs. Cambray, although she declared herself perfectly satisfied therewith. The accounts were, however, at length, properly audited, and a deed of release and indemnity drawn out and approved of by her solicitor, according to which the indemnity fund was to be kept in its then state till twenty years from the date of the indenture. The plaintiff refused to concur in locking up the fund for more than three years, and it afterwards appeared that the consent of her solicitor to impound the fund for any period at all had been beyond his instructions. The bill alleged that the plaintiff had found it necessary to borrow from Messrs. Coutts's bank, at considerable expense, a sum of money for capital to carry on her deceased husband's business, (that of a fruit salesman), owing to the refusal of the defendants to advance any part of the residuary estate, which was much larger in amount than the sum so raised; and the bill charged that the defendants endeavored to prevent her from carrying on the said business, by withholding the necessary capital in the hopes and intention of succeeding to it themselves. This imputation, however, was of course denied by the defendants in their answer, who alleged that the business of a fruit salesman required no capital. The bill prayed the usual administration decree of personal estate. It appeared by the answers that the accounts of the testator's debts and funeral expenses had never been fully taken, and that the defendants had reason to believe that some liabilities of the testator were still outstanding. In particular, it was stated that the testator had been the personal representative both of his father and of a deceased brother, and that legal proceedings were on foot against him during his life, and still continued on foot against his estate, in his character of personal representative to each of them, his father and brother; and that the testator had, very shortly before his death, stated that he had contracted for the purchase of 500 quarters of wheat, which contract, if it existed, was still uncompleted, but which the defendants could learn nothing about. The decree, at the hearing, directed the payment (by consent of the plaintiff and the defendants, the executors) of the debt and interest to Coutts, the residue of the fund to be transferred into court, with the usual administration decree, the plaintiff submitting to account. The principal question now contested was, whether the conduct of the defendants, the executors, had been such as to deprive them of their right to costs.

*Russell and Rudall*, for the plaintiff.

*Bacon and Speed*, for the defendants, the executors.

The demand by the legatee, to have paid over to her all the residue within three months of the testator's decease, could not be complied with. *Fearnhead v. Knatchbull*, 3 My. & C. 122; *Norman v. Baldry*, 6 Sim. 621. The case made at the bar is not the same as that made by the bill. The charges of fraud in the bill being denied by the answer, and not supported by any evidence, is sufficient to justify the dismissal of the bill with costs. *Gibson v. D'Este*, 12 Jur. 527.

*Russell*, in reply.

June 6. Sir G. TURNER, V. C. The only question is, whether these executors are to be deprived of their costs. It is not asked that costs should be given as against them. The ordinary rule undoubtedly entitles executors to the costs of a release by the legatee; and where the legatees refuse to release the executors by deed, they, the executors, have a right to the costs of a suit in equity instituted for the purpose of taking the accounts, because that is the only way in which the executors can be effectually discharged, namely, by the decree of this court. It is, I think, on the same principle that the executor or other person administering the estate is entitled to be indemnified by the legatee, in the case of his paying over the residue, after the payment of debts, &c. The care which it is requisite that executors should observe is clearly shown by the decisions, and in none more than in *Fearnhead v. Knatchbull*. In that case the breach of trust had been committed by the testator in 1801, thirteen years before his death. His executors had never even heard of the breach of trust, or of the existence of the trust under which their testator had rendered himself liable, and they had long since paid and distributed the whole of the assets of their testator. Yet, the testator having left assets to answer the breach of trust, if they had not been administered, his executors were held personally liable to make good this breach. It is evidently, therefore, the anxious duty of the court to take care that executors are properly protected as to costs when called on to pay over the balance of the testator's estate. I will not say that in no case is it possible for executors to be so unreasonable as that they cannot be deprived of their costs of coming here for the indemnity of this court; but this I do say, that it must not only be shown that the executor has insisted on an indemnification to which he had no right, but that he has insisted oppressively on such an indemnity.

What, then, is the position of the parties in this case? The testator died in 1848, and it appears that he had, a short time previous to his decease, entered into a large contract for wheat. Independent of that, this testator is the administrator of his deceased brother, and the executor of his deceased father; and it appears that demands have already been made upon these defendants in respect of claims against the testator in both of these capacities. No executor can be said to make an unjust claim if, under such circumstances, and with such indeterminate liabilities against the estate of his testator, he requires from the legatee an indemnity against them before paying over his balance. But the indemnity thus required is said to be unreasonable, because the executors proposed that the estate should be impounded for twenty years. Unfortunately the law has not provided any means for ascertaining what shall be a sufficient indemnity. The act provides a method, but it cannot be acted on where the residuary legatee disputes the amount of the indemnity; and, besides, it was passed since this suit was instituted. In this case it appears that the solicitor for the legatee had himself approved of the indemnity proposed by the executors, and that the legatee afterwards went back

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Thomas v. Townsend.

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from it. But if a difference arises on the question of the indemnity, does it follow, the bill raising the question what indemnity the executors are entitled to, and my opinion being that they are entitled to some indemnity, and there being no other complete indemnity than having the accounts taken in this court—does it follow that the executors are to be deprived of their costs because they have insisted on too much, or rather on having the fund locked up for too long a period? I think twenty years is an unnecessarily long period to keep the fund impounded; but it is not because the executor has asked for too long a period of impoundment, he is, therefore, to be deprived of his costs. There is, therefore, no sufficient case to deprive these executors of their costs. As to the arguments founded on the executors having proceeded to distribute part of the fund, and that they were, therefore, bound to go on with the whole, I think there is no weight at all in it. It is one thing to pay a few small legacies, and another thing to part with the possession of the whole residue. There will, therefore, be the usual decree in a suit by the residuary legatee for administration of the estate.

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THOMAS v. TOWNSEND.<sup>1</sup>

July 31, 1852.

*Power of Sale.*

A trustee, having power to sell land in order to raise 600*l.* and the expenses, put it up to sale in two lots, and sold the first for 600*l.*, and the second for 510*l.* The second lot consisted of more than three acres of land, and was described in the particulars of sale as readily convertible into building ground:—

*Held*, that the sale of the second lot was not improper, and that the purchasers must pay the costs of a suit for specific performance brought against them by the trustee.

MARY BROWN, by her will and three codicils, made by virtue of a power, gave certain hereditaments to trustees, on trust that they should, after the decease of Thomas Brown, her husband, absolutely sell and dispose of the said hereditaments, with the appurtenances, either by public auction or private contract, for the most money and best price that could be reasonably had or obtained for the same, and out of the purchase-money, after deducting the expenses, the trustees were to pay three legacies of 200*l.* each, and to pay the residue to certain charities. The gift to the charities was admitted to be void. The testatrix died in March, 1850, and her husband in October following. In December, 1850, the surviving trustee put up the hereditaments for sale, in two lots. The second lot consisted of a piece of land containing a little more than three acres, which was described in the particulars of sale as abutting on one side upon a certain public road

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<sup>1</sup> 16 Jur. 736.

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Thomas v. Townsend.

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therein named, and as "readily convertible into building ground." The first lot was sold to a purchaser for 600*l.*, and the second was then sold to the defendants for 510*l.* The defendants were advised by counsel that it was unsafe to complete the purchase without the concurrence of the heir at law; that it was the clear duty of the trustee to sell only so much as was necessary to raise the 600*l.* and expenses; and that the selling 500*l.* worth of property for the expenses of raising 600*l.* was so disproportionate, that there would be no defence against the heir at law complaining of such a transaction; that the fact that the defendants had bought the land with the intention of selling it in lots for building showed that there could not have been any difficulty in selling just sufficient; and that the defendants, taking with full knowledge of the facts, would not be safe. The trustee, after some correspondence, filed a claim for specific performance; upon which the usual reference as to title was made. Master Tinney reported that a good title could be made, and that it was shown on the 30th December, 1850, the time when the abstract was delivered. The cause now came on for further directions.

*Selwyn* and *Bristowe*, for the plaintiff, asked for the usual decree for specific performance, with costs. There could not be any doubt as to the title. *Spalding v. Shalmer*, 1 Vern. 301.

*H. Cadman Jones* (*W. M. James* with him, absent) submitted to a decree for specific performance, but objected to the payment of costs. He referred to Sugd. V. & P. 825, as showing that a purchaser who took a fair objection to the title, though he failed, would not be ordered to pay costs. He then stated the nature of the objection taken to the title, referring to the description of the second lot in the particulars of sale, and contended that there was so much doubt that the defendants ought not to be fixed with costs; that they were most willing purchasers, but as they had been repeatedly and positively advised by a very eminent counsel that the title was bad, they could not in common prudence complete their purchase without taking the opinion of the court.

Sir R. T. KINDERSLEY said, that though he could not call the objection a frivolous one, it was, in his opinion, quite untenable. He referred to *Calvert v. Godfrey*, 6 Beav. 97, and the other cases, showing that where property is sold by order of the court, the purchaser, provided the court has jurisdiction to sell, is not at liberty to object that too much has been sold.

*H. Cadman Jones* observed that this was not a sale by order of the court.

Sir R. T. KINDERSLEY, V. C., said that the same principle applied in each case. The trustee could not tell beforehand what the property would fetch, and therefore could not make such arrangements as would secure the selling exactly the necessary quantity. He thought that there was nothing in this case to take it out of the ordinary rule,

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White v. Bradshaw.

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that a purchaser, failing in his objections to the title, must pay the costs of the suit; and the purchasers here might console themselves with the reflection that they would take a title which had been pronounced by the court to be free from any substantial objection.

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WHITE v. BRADSHAW.<sup>1</sup>

December 17, 1851.

*Specific Performance of Agreement to Purchase — Description —  
Caveat Emptor.*

At the Auction Mart, in London, the defendant purchased a house at Brighton, simply described as "Lot 1, No. 39 Regency-square." He afterwards discovered that the house was not actually in the square, but in a side street communicating with the square, but it was always named 39, Regency-Square: —

*Held*, that there was no misdescription; and specific performance was decreed against the purchaser.

THIS was a claim by the vendor for specific performance of an agreement to purchase a house at Brighton. It appeared that on the 17th January, 1851, the house in question, described in the particulars of sale as "Lot 1, No. 39 Regency-square," was put up for sale by auction at the Auction Mart, in the city of London, and that on that occasion the defendant was the highest bidder, and was declared to be the purchaser of the said house for the sum of 860*l.*, and thereupon he paid the deposit, and agreed to pay the remainder of the purchase-money on or before the 25th of March, 1851. The defendant subsequently refused to complete his contract, alleging as his defence, that he was in the sale-room on the day of sale for the purpose of purchasing other property which was advertised for sale on the same day, but this lot being put up first, he bought it; that he had not previously seen the house, and was entirely unacquainted with its actual situation, but that he believed it to be actually situated in Regency-square; and that there was no statement or reference in the particulars of sale which would lead any intending purchaser to believe otherwise than that the house was actually situated in Regency-square, and commanding a sea view therefrom; but that the defendant had subsequently found that the house was not actually situated in Regency-square, but in a street leading from that square to an adjoining square, and that the sea view was intercepted by the side of one of the houses in Regency-square. The defendant had claimed compensation for this as an error in the description of the lot in the particulars of sale. This being refused, he declined to complete the contract.

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Brace v. Foulkes.

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*Chandless and Surrage*, for the plaintiff.*J. Russell*, for the defendant.

Sir J. PARKER, V. C., said that it appeared that the subject of the sale was a house in Brighton, well known there by the name of 39, Regency-square. The plaintiffs, it seemed, had occupied it under that name; they had no fraudulent intention in so naming it in the particulars of sale. The house had been sold by auction under that description. His honor did not think there had been any misdescription here at all. The defendant purchased the house under these circumstances. It appeared that the defendant, at the time of the purchase, knew enough of Regency-square to know that it was a desirable locality, but not to know whether the house was in it or not. In one sense the house was not in the square, but in another sense it was, being called part of the square. But his honor did not rest his view of the case upon that fact. The house was known by the name of 39, Regency-square. The defendant went to the auction and bought it by that name, without inquiry, and his honor considered that the defendant could not now object to perform the agreement. There must be a decree for specific performance, with costs.

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BRACE v. FOULKES.<sup>1</sup>

January 14, 1852.

*Partition — Claim.*

A suit was instituted by bill for the partition of real estate. Before this suit was brought to a hearing, a claim was filed for the partition of a portion of the same property, the plaintiff in the claim being interested in that portion only. The court made a decree on the claim, declining to postpone the claim until the hearing of the suit.

THIS was a claim for a partition, filed by George Brace, who stated, that under and by virtue of the will, dated the 4th May, 1789, of William Foulkes, who died in 1795; and under and by virtue of the will, dated the 30th January, 1802, of Joseph Foulkes, son of the said William Foulkes, who died in 1802; and under and by virtue of an indenture dated the 7th August, 1851, and made between Ann Foulkes of the first part, the plaintiff of the second part, and G. H. Colt of the third part; the said George Brace was seized for an estate of inheritance in fee simple, subject to the usual limitations to bar dower, of one undivided sixth part of certain freehold property therein described. It appeared that a suit for the partition of this and other property under the same title had been instituted by bill some time

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<sup>1</sup> 16 Jur. 738.

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 Stuart v. Frankland.
 

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since, but it had not been brought to a hearing; and it was objected that this claim should be postponed until the suit relating to the whole property was heard.

*Bacon* and *J. V. Prior*, appeared for the plaintiff.

*De Gex*, *Beales*, and *Herman L. Prior*, appeared for the defendants, owners and mortgagees of shares.

Sir J. PARKER, V. C., directed an inquiry as to who were the parties entitled to the property, and in what shares; and if the Master found that all the parties interested were before the court, then the ordinary decree for partition. His honor added, that unless the parties consented as to the shares in which they were entitled, that was the only decree he could make. He did not think the suit by bill could be an impediment in the way of the partition.

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### STUART v. FRANKLAND.<sup>1</sup>

January 14, 1852.

#### *Will—Construction—Legacy upon Condition.*

By deed certain real estates were settled to the separate use of M., a married woman, for life, without power of anticipation; remainder to her son W. for life; remainder to his first and other sons in tail male; remainder to the second and other sons of M. in tail male, with divers remainders over; provided that the trustees therein mentioned might, during the life of M., fell timber on the estate, and should invest the proceeds of the sale thereof, and pay the income thereof, during M.'s life, to the person entitled to the rents of the estate; and after her decease, should pay the principal among all M.'s children, except an eldest or only son, entitled to the estate in tail, or in tail male, under the preceding limitations, as M. should appoint, and in default equally. The plaintiff afterwards became a trustee of the settlement, and he and his co-trustee, J. L., cut down timber, which produced 1,500*l.*, of which 1,000*l.* was paid, at M.'s request, and on a promise by J. L. to indemnify the plaintiff, to M.'s husband, to make certain repairs on the estate; and the remaining 500*l.* was invested in consols. M.'s husband, shortly after the payment of the 1,000*l.*, invested 500*l.*, part thereof, in consols, in the names of the trustees; but J. L. was never aware of that fact. J. L. died in 1847, having by his will, which recited the above facts, except the last-mentioned investment of 500*l.* directed his executors, in order to indemnify his co-trustee, and both their representatives, at the end of twelve months after his death, to pay the sum of 1,000*l.* clear of legacy duty, unto such person or persons as would be then legally or beneficially entitled to the moneys arising from the sale of the timber, provided that such person or persons should accept the same in discharge of any claim which they might have in respect of the said sum of 1,000*l.*, and should execute an effectual release. M. had four children, one of whom was a married woman:—

*Held*, that the persons beneficially interested in the timber money were entitled to the whole legacy, if they accepted it as in the will mentioned, notwithstanding that the testator had made the bequest in ignorance of the fact that the trustees were only liable for 500*l.* instead of 1,000*l.*, and notwithstanding that by reason of the coverture of two of the *cestuis que trust* a proper release could not be given.

THIS was a claim to have the trusts of the will of John Leech car-

*Stewart v. Frankland.*

ried into execution, so far as related to the sum of 1,000*l.* hereinafter mentioned, and to have the said sum, with interest thereon, paid to the plaintiff, as the surviving trustee of an indenture of settlement, dated the 5th September, 1818, in full discharge of all claims against the estate of the said John Leech and the plaintiff, in respect of the application of 1,000*l.*, part of the produce of the sale of certain timber, and for the costs of the suit. By indentures of lease and release, dated the 4th and 5th September, 1818, in pursuance of the will of William Gill, deceased, certain real estates were settled to the use of the said John Leech and Edward Leech, and their heirs, during the life of Mary Frankland, the wife of James Henry Frankland, in trust for the separate use of Mary Frankland during her life, without power of anticipation, and subject thereto to the use of her son, William Henry Frankland, for life, with remainder to the use of his first and other sons in tail male, with remainder to the second and other sons of Mary Frankland in tail male, with divers remainders over; and by the said indenture it was provided that it should be lawful for the trustees, during the life of Mary Frankland, to fell timber upon the said hereditaments, and to invest the moneys to arise thereby, and during the life of Mary Frankland to pay the annual produce in like manner as was thereinbefore declared concerning the rents and profits of the said hereditaments during her life; and after her decease, to pay the said trust moneys unto or among all and every the children of the said Mary Frankland, other than and except an eldest or only son, for the time being entitled, under the limitation aforesaid, to an estate of inheritance in tail, or in tail male, in the said hereditaments, as the said Mary Frankland should by will appoint; and in default of appointment, among such children as therein mentioned, equally, &c. In 1824, Edward Leech retired from the trust, and the plaintiff was appointed trustee in his place. In 1828, John Leech and the plaintiff cut down timber growing on the said estates, the sale whereof produced 1,500*l.* In January, 1829, John Leech received the following letter from Mary Frankland:—

“Eshing, Jan. 29, 1829.

“My dear Mr. Leech,—It having been ascertained that the farm at Eshing, in the occupation of H. Shatter and C. Keen, belonging to my late uncle, William Gill, could not be let to eligible tenants without an undertaking to rebuild the dwelling-houses and to repair and enlarge the farm offices thereupon, such an undertaking has been completed at an expense of 1,500*l.* It is my wish and desire that the trustees under the will of my said uncle should apply 1,000*l.* towards the liquidation of such expense, out of moneys in their hands arising from the sale of timber lately cut on his estates, and held by them in trust. In doing this I am sure you will agree with me in thinking that the trustees will be fully justified before God and man.

“Believe me, my dear Mr. Leech,

“Your very affectionate and obliged,

“M. FRANKLAND.”

John Leech, who was the acting trustee, accordingly promised the



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plaintiff that he would indemnify him against any liability in respect of such application of the timber money, and the sum of 1,000*l.* was paid to James Henry Frankland on account of such repairs, and the remaining 500*l.* was invested in consols, in the names of John Leech and the plaintiff. By his will, dated the 29th September, 1843, John Leech made the following provision:—"Whereas, under and by virtue of the will of William Gill, Esq., and the settlement made in pursuance thereof, certain estates therein described are settled for the benefit of Mary, the wife of James Henry Frankland, and her issue, as therein mentioned, and in the said settlement is contained a power of cutting timber on the said settled estates, and applying the produce thereof as therein directed, under which power I and my co-trustee, the Rev. Charles Augustus Stewart, some time since cut and sold timber to the amount of 1,500*l.*, of which 500*l.* were invested in 3*l.* per cent. consols; and inasmuch as the farm-houses and other buildings at Eshing aforesaid were then in a dilapidated state, and the said James Henry Frankland had expended large sums of money on the said settled estates out of his own private funds, we advanced and laid out (with the consent of the said Mary Frankland) the sum of 1,000*l.* (residue of the timber money) towards the repairs and rebuilding thereof; but however just may have been the appropriation of the said sum of 1,000*l.* for the purposes aforesaid, some doubts have prevailed with me and my co-trustee as to its legal application; now, in order to indemnify and save harmless my said co-trustee, and his and my personal representatives, from any loss by such appropriation thereof, I direct the said George Oliver, George Tickner, and Richard Payne, or the survivors or survivor of them, or the executors or administrators of such survivor, at the end of twelve calendar months after my decease, to pay the sum of 1,000*l.* (clear of legacy duty, if liable thereto) unto such person or persons as would be then legally or beneficially entitled to the moneys arising from the sale of such timber, provided that such person or persons accept the same sum in discharge of any claim which they may have in respect of the said sum of 1,000*l.* appropriated as aforesaid, and execute an effectual release accordingly." And the said testator appointed the said George Oliver, George Tickner, and Richard Payne, executors of his will. The testator died on the 16th April, 1847, and his said will, and three codicils thereto, were duly proved. There were living four children of Mary Frankland, one of whom was a married woman. It appeared that James Henry Frankland, shortly after the payment of the 1,000*l.*, had invested 500*l.*, part of that sum, in consols, in the names of John Leech and the plaintiff; and it was stated by John Leech's executors that they believed John Leech did not know of this investment.

*Bacon* and *Erskine* appeared for the plaintiff.

*Wickens*, for the parties beneficially interested under the settlement.

*Russell* and *Joliffe*, for the executors of John Leech, contended that the plaintiff was not entitled to have the full sum of 1,000*l.* paid, as

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500*l.* had been invested by Mr. Frankland in discharge of part of the liability, and therefore the testator had made the bequest under a mistaken notion as to the amount of his liability. The legacy by way of indemnity would only operate to the amount of 500*l.* This breach of trust having been committed at Mrs. Frankland's request, her life interest was the primary fund to be applied to answer it, and John Leech's executors ought to be allowed to stand in the same position as the trustees would have been in that respect if there had been no legacy. John Leech's executors could not be called upon to pay the 1,000*l.* until a proper release was tendered to them, and no proper release had been or could be given, by reason of the coverture of two of the *cestuis que trust*. Then the surviving trustee could not make this application, for the legacy was not to him, but to the persons beneficially interested, who had not called upon the executors to pay over the legacy.

Sir J. PARKER, V. C., said that he did not think there was much doubt on the substance of the case. His honor referred to the terms of the gift, and said that the legacy was given for certain reasons, which were mainly an apprehension on the testator's mind that he was subject to a larger liability than, in fact, he was subject to. His honor thought that that circumstance could not affect the gift of 1,000*l.* Supposing the testator were not, in fact, liable to any thing, the gift was to such person or persons as would be legally or beneficially entitled to the moneys arising from the sale of the timber, provided they should accept the same in discharge of any claim. His honor thought that the plaintiff had an interest to call upon the court to provide for the payment of that legacy, if he did so accept it.

[*Bacon.* He does accept it.]

His honor said that in that case the court had no difficulty in declaring that this sum of 1,000*l.* should be accepted in discharge of all such claims as in the will mentioned. The executors were entitled to a release, and the release could not be given, because the tenant for life was subject to restraint upon anticipation, and one of the persons entitled in reversion was a married woman. His honor thought that the fund must come into court, with a stop order upon it, and the income must be directed to be paid to Mrs. Frankland for her life, for her separate use, with liberty to apply at her death.

The following were the minutes of the decree:—Declare, that it is for the benefit of the persons beneficially interested, that the legacy of 1,000*l.* should be accepted in satisfaction of any claim in respect of the timber money. Let the defendants, the executors, pay into court the sum of 1,000*l.*, and let it, when paid in, be invested in 3*l.* per cent. bank annuities, to a separate account, to be entitled "The Account of the Legacy;" not to be sold or transferred without notice to the executors. Let the dividends of the stock, when purchased, be paid to the defendant, Mary Frankland, on her separate receipt. Let the executors pay to Mrs. Frankland on her separate receipt, interest on the 1,000*l.*, at the rate of 4*l.* per cent., from the 16th day of April, 1848. The defendants, the executors, to pay the costs of all parties.

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Holliday v. Overton.

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HOLLIDAY v. OVERTON.<sup>1</sup>

June 10, 1852.

*Will—Testamentary Appointment.*

By a marriage settlement, reciting that the rents, issues, and profits of the property to be thereby settled should be to the separate use of the intended wife for life, and after her decease, for the further purpose of making of the reversion and principal thereof a provision for the children of her former marriage, certain real and personal property then belonging to the intended wife was conveyed to trustees, in trust to pay the income to the intended wife for life; and after her decease, in trust for such persons and in such manner as she, "in and by her last will and testament, or instrument testamentary, or in the nature of a will, in writing, to be signed and published by her in the presence of three or more credible witnesses, upon testamentary considerations only, during her intended coverture should direct or appoint."—

*Held*, that the words "during her intended coverture" applied to the whole clause, and that an appointment made by the wife after the death of the husband was an invalid execution of the power.

THIS was an appeal from the decision of Sir John Romily, M. R., upon the construction of a power of appointment given by a marriage settlement, and also upon the question, who were the parties entitled under the settlement in default of appointment. It appeared that in September, 1825, Mary Heathcote, then a widow and mother of six children, intermarried with Edmund Drayton. By the settlement made on the occasion of such marriage, dated the 23d September, 1825, reciting that the rents, issues, and profits of the property to be thereby settled should be for the separate use of Mrs. Heathcote, and after her decease, for the further purpose of making of the reversion and principal thereof a further provision for the children of her former marriage, certain real and personal property belonging to Mrs. Heathcote were respectively conveyed and assigned to a trustee, his heirs, executors, administrators, and assigns, upon trust, after the solemnization of the marriage, to pay the rents, issues, and profits of the said real estate, and the interest, income, and annual profits of the said trust funds, "to the said Mary Drayton during her natural life, for her separate use and benefit, without power of anticipation; and from and after the decease of the said Mary Drayton, then to stand seized and possessed of all the said premises, in trust to and for all such person or persons, and to and for such trusts, intents, end, and purposes, and in such manner respecting the same, and of all and every part thereof, as the said Mary Drayton, in and by her last will and testament, or instrument testamentary, or in the nature of a will, in writing, to be signed and published by her in the presence of three or more credible witnesses, upon testamentary considerations only during the intended coverture, should direct or appoint; and for want and in default of such last-mentioned direction or appointment, or as to so much and such part of the said premises whereof no complete direction or appointment should have been made, in trust for the

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<sup>1</sup> 16 Jur. 751.

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children of the said Mary Drayton, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." The marriage was duly solemnized, but there was never any issue thereof. After the decease of Mr. Drayton, Mrs. Drayton, by a will, dated in November, 1845, purporting to be made in exercise of the power given to her by the settlement, and duly executed in conformity therewith, devised and bequeathed all her real and personal property for the benefit of four only out of the six children of the first marriage. Upon the hearing of the claim, the object of which was to establish the validity of this appointment, two questions were raised; the first, whether the power of appointment could be exercised after the determination of the coverture; and, secondly, whether, in the event of the appointment being invalid, the children of Mrs. Drayton took absolute interests or life-estates only in the property comprised in the settlement. The Master of the Rolls held, 16 Jur. 374; s. c. 10 Eng. Rep. 175, first, that the power given to Mrs. Drayton by the settlement could only be executed during the coverture, and consequently that the appointment which had been made was invalid; and, secondly, that the children of Mrs. Drayton took life-estates only in the settled property.

*Lloyd and Speed*, appeared for the plaintiffs, the appellants; and

*Roundell, Palmer, Sheffield, and Amphlett*, for the different defendants.

For the arguments urged by counsel on both sides, and the authorities referred to, see the report of the hearing before the Master of the Rolls, 16 Jur. 346; s. c. 10 Eng. Rep. 177.

LORD CRANWORTH, L. J., after stating the facts of the case, and reading the terms of the power given to the wife by the settlement, said—It is contended that this gives the lady power to dispose of the property either during the coverture or afterwards. This depends upon the words "upon testamentary considerations;" and I concur with the Master of the Rolls in thinking it a restriction upon her power to the period of the coverture. The language is obscure, and open to doubt, but I think that is the more rational construction. The recital in the will is as consistent with the one construction as the other of those contended for. The order of the Master of the Rolls as to this part of the case, was, in my opinion, right.

SIR J. L. KNIGHT BRUCE, L. J. I feel some doubt upon this question of construction, but upon the whole I am of opinion that the order of the Master of the Rolls is correct.

*Amphlett* then proceeded with his argument upon the question, who were the parties entitled in default of appointment; but by arrangement the discussion was ultimately dropped, upon terms that the appellants should not pay the costs of appeal.

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 Knott v. Cottee.
 

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 KNOTT v. COTTEE.<sup>1</sup>

March 11 and 12, 1852.

*Liabilities of Trustees and Executors — Allowances — Rests — Costs — Exceptions — Special Circumstances.*

A testator, by his will, gave his residuary real and personal estate to trustees, upon trust for his wife for life, and after her decease upon trust for his children; and he directed, that after the death of his wife, and during the minority of any of his children, the trustees should apply, towards the maintenance of his children, a certain portion of the income of their then expectant shares, and accumulate the surplus income of each such share at compound interest. After the death of the widow, the sole surviving trustee neglected to accumulate the surplus income of each child's share, and invested large portions of the testator's estate in exchequer bills and other securities not authorized by the trusts of the will:—

*Held*, that the investments which had been made being improper investments, the executor was chargeable in the same manner as if he had retained the moneys in his own hands; but under the circumstances of the case, as it did not appear that he had benefited himself by it, and had not employed the sums so retained in trade, that he was chargeable only with interest at 4l. per cent.

*Held*, also, that as the trustee had been guilty of a breach of trust in neglecting to accumulate the surplus income of each child's share, he was to be charged with annual rests.

*Held*, also, notwithstanding he was chargeable as above, that he was entitled to his usual costs of suit, as between solicitor and client, out of the estate.

A testator gave all his residuary real and personal estate to trustees, upon trust for his wife for life; and after her death he directed that a just and true valuation should be made of "all his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate," and directed the same to be divided, or considered as divided, into seven equal parts, and then disposed thereof; and the testator directed that A. B., one of his executors, who was a surveyor by profession, "should be entitled to charge, and should be allowed all reasonable charges as a surveyor, in valuing his said freehold and leasehold estates, and in letting the same, and in collecting the rents, or otherwise in the management of his said estates, whenever requested or instructed so to act by his co-trustees:—"

*Held*, that this latter clause applied solely to the valuation and management of the freehold and leasehold estates, and that A. B. was not entitled, under this clause, to make any charges in respect of valuations made by him of the residuary personalty after the death of the testator's widow

Where the Master has liberty to state special circumstances, it is entirely within his discretion to state any circumstances specially or not; and if he refuses to do so, exceptions to his report on that ground will be disallowed.

THIS was a suit for the administration of the trusts of the will of one George Knott, instituted by two of the infant children of the testator against Henry Cottee, the surviving trustee and executor of the will, and against the heir at law of the testator. By his will, dated 2d November, 1843, the testator gave all his residuary real and personal estate to his wife, Ann Knott, his partner in business, Thomas Ingledew, and the defendant Henry Cottee, their heirs, executors, administrators, and assigns, upon trust, as to his residuary personal estate, to collect, get in, and receive, and convert into money, all such parts thereof as should not consist of stock in the public funds, and to lay out and invest the clear residue and surplus in the public or

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government stocks or funds of Great Britain, or upon real securities in England or Wales; and he directed his said trustees to pay the rents of his residuary real estate, and also the income of his residuary personal estate, to his said wife for her life; and after her decease he directed that a just and true valuation should be made of his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate, and that the same should be divided, or considered as divided, into seven equal parts or shares, and that four seventh parts or shares thereof should be in trust for his son, George Knott, and his issue, in manner therein mentioned; and that one seventh part or share thereof should be in trust for each of his three daughters and her issue, in manner therein mentioned; with divers remainders over in the contingencies therein mentioned; and in the will was contained, amongst other things, a power for the trustees, from time to time, at their or his discretion, to alter, vary, and transpose all or any of the stocks, funds, and securities, and the accumulations thereof, which should for the time being be subject to the trusts of the will, or any of them, into any of the public stocks or funds of Great Britain, or for or into government or real securities in England or Wales; and the testator also directed, that after the decease of his widow, and during the minority of any of his children, it should be lawful for the trustees to apply, towards the maintenance and education of any such child, any part, not exceeding two thirds, of the income of the share to which such child should for the time being be presumptively entitled, and should accumulate the surplus annual income of each such child until he or she should attain twenty-one, who was then to be entitled to such accumulations, in the same manner as his or her original share; and the testator thereby appointed the said Ann Knott, Thomas Ingledew, and Henry Cottee executors of his said will; and the testator directed, amongst other things, that the said Henry Cottee, who was an architect and surveyor by profession, "should be entitled to charge, and should be allowed all reasonable charges, as a surveyor, in valuing his, the said testator's said freehold and leasehold estates, and in letting the same, and collecting the rents, or otherwise in the management of his said estates, whenever requested or instructed so to act by his co-trustees or co-trustee."

By a codicil to his will, dated the 2d November, 1843, the testator directed, that notwithstanding the trusts in his will, his trustees should, after the death of his wife, apply the annual sum of 1,200*l.* in and towards the support of an establishment for the use of his children, until the youngest should attain twenty-one. The testator died on the 16th January, 1844, and on the 12th February, 1844, the will was proved by the executrix and executors therein named. The testator left his widow, the said Ann Knott, and his four children named in the will, him surviving, one of whom, Emma, died on the 5th July, in the same year, an infant and unmarried. The defendant, Cottee, had been employed by the testator, for some years previous to his death, to manage his estates, and to receive the rents and profits thereof; and upon the testator's death, with the concurrence of his

co-trustees and co-executors, he continued in the receipt of the rents of the testator's freehold and leasehold estates, and took the active management of the executorship and trusteeship, the other executors and trustees not interfering in any manner in the execution of the trusts.

At the time of his death the testator was possessed of personal property, consisting of his share in a wholesale business carried on by him in partnership with the said Thomas Ingledew, and of various other particulars, to a large amount, and amounting in the whole to upwards of 59,000*l*. The defendant Cottee, immediately after the testator's death, proceeded to get in the personal estate, and at different periods, from the 8th March, 1844, when the first payment was made, down to the 13th December in the same year, being within a year of the testator's death, he had received, on account of the testator's share in the said partnership, different sums, amounting in the whole to the sum of 36,700*l*., being the full amount of his share, with the exception of a small balance of 226*l*. 9*s*. 11*d*., which balance he received on the 25th September in the following year. The sums actually received by him, previous to the filing of the bill on the 1st December, 1845, amounted in the whole to upwards of 40,000*l*. The sums so received by Cottee he applied in payment of the testator's debts and funeral expenses, and invested the surplus in various securities as follows:— About 30,955*l*. were at different times, from the 13th March, 1844, when the first of such investments was made, down to the 29th August in the same year, when the last of such investments was made, invested in 30,200*l*. 3*l*. 10*s*. per cent. bank annuities, afterwards converted into 30,200*l*. 3*l*. 5*s*. per cent. bank annuities; and subsequently various further sums, amounting in the whole to 2,706*l*. 10*s*. 11*d*., were invested in the purchase of 2,793*l*. 17*s*. 9*d*. 3*l*. 5*s*. per cent. bank annuities.

In addition to the above investments, the defendant Cottee also invested at different periods various sums, amounting in the whole to 7,487*l*. 13*s*., in the purchase of 12,400*l*. Belgian 2*l*. 10*s*. per cent. government bonds; and also at various times various sums, amounting in the whole to 3,755*l*. 2*s*. 8*d*., in the purchase of exchequer bills, for the amount, in the whole, of 3,900*l*. Besides the above investments, the defendant Cottee also at various times made sundry loans on different securities, which were all repaid; and he also made various other investments in foreign stocks and securities, which said investments were from time to time varied by him; and all the sums so advanced by him upon such loans as aforesaid, and all the sums so invested by him on such foreign and other securities, were got in, and, together with the profits resulting therefrom, were invested as above mentioned; and at the time of the filing of the defendant's answer, the testator's estate consisted of the before-mentioned investments in the 3*l*. 10*s*. and 3*l*. 5*s*. per cent. bank annuities, of the before-mentioned investments in Belgian government bonds and exchequer bills, and of property which remained in the same state as at the death of the testator, including, amongst other things, the three following sums of stock standing in the name of the testator,

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namely, 1,700*l.* bank 3*l.* per cent. annuities, 5,000*l.* consols, and 400*l.* 3*l.* 5*s.* per cent. reduced annuities, and amounting in the whole to 10,206*l.* 10*s.* 3*d.* The testator's widow (the tenant for life under the will of the testator's residuary real and personal estate) died on the 1st of October, 1844, leaving the defendant Cottee, and his co-executor and co-trustee, Thomas Ingledew, her surviving, the latter of whom died on the 31st October, 1845; whereupon the defendant Cottee became the sole surviving trustee and executor of the testator's will.

On the 1st December, 1845, the bill in this suit was filed by Ann Knott and Amelia Knott, two of the infant children of the testator, against the defendant Cottee and George Knott, the other child and heir at law of the testator, (who was also an infant), for the administration of the testator's estate, praying the usual accounts, but not seeking any special relief against the defendant Cottee. To this bill the defendant Cottee put in his answer, setting forth fully his dealings with the trust funds. The bill was then amended, charging that considerable loss had been incurred by the testator's estate in consequence of the different investments which had been made by Cottee, and by his variations of the investments from time to time; and praying that the defendant Cottee might be charged with any loss which had been sustained in consequence of such investments, and variations of investments, and that he might be charged all gains made by him by any dealing, in shifting securities or otherwise, with the testator's estate.

The cause came on for hearing on the 16th March, 1848, when the common decree was made for carrying into effect the trusts of the testator's will, and for administering the estate of the testator; and it was declared that the investment of any part of the personal estate of the said testator by the defendant Henry Cottee, either by way of loan, upon the deposit of exchequer bills, 5*l.* per cent. Russian bonds, Belgian 2*l.* 10*s.* per cent. government bonds, Belgian scrip, Dutch 2*l.* 10*s.* per cent. bonds, Mexican bonds, Portuguese bonds, Spanish bonds, Spanish 3*l.* per cent. bonds, or Columbian bonds, was an improper investment; and it was ordered that the Master, in taking the accounts of the personal estate of the testator, not specifically bequeathed, come to the hands of the defendant Cottee, should have regard to the above declaration.

The Master, by his report, found that the personal estate of the testator come to the hands of the defendant Cottee amounted to the sum of 51,824*l.* 17*s.* 5*d.*; and he allowed him, in his discharge, sums amounting in the whole to the sum of 48,208*l.* 15*s.* 10*d.*, finding, therefore, a balance due from him of the sum of 3,616*l.* 1*s.* 7*d.* But the Master found, as special matter, that the defendant had invested various sums, parts of the testator's estate, to the amount of 4,063*l.* 11*s.* 5*d.*, in the purchase of 3,900*l.* exchequer bills; and that the said defendant had, in pursuance of an order made in the cause, dated the 6th July, 1846, deposited the said exchequer bills in the bank, in the name of the Accountant-General, to the credit of the cause; and that on the 24th November, 1846, the said 3,900*l.* ex-



chequer bills were, in pursuance of an order of the 3d November, 1846, sold, and produced the sum of 3,955*l.* 14*s.* 9*d.*, 450*l.* whereof was paid to one Mary Prior, in pursuance of the said order, and the residue of the said sum, being the sum of 3,505*l.* 14*s.* 9*d.*, was, on the 1st December, 1846, invested in the purchase of 3,690*l.* 5*s.* bank 3*l.* per cent. annuities, in trust in the said cause; and he stated, that, having regard to the declaration contained in the said decree, he had not credited the defendant Cottee with the proceeds of such exchequer bills. And the said Master found also, as special matter, that in the years 1844, 1845, and 1846, the defendant Cottee invested the sum of 7,487*l.* 13*s.* in the purchase of 12,400*l.* 2*l.* 10*s.* per cent. Belgian government bonds; and that 7,261*l.* 8*s.*, part of the said sum of 7,487*l.* 13*s.*, formed part of the personal estate of the said testator; and that 226*l.* 5*s.*, residue thereof, arose from interest on 12,000*l.* Belgian bonds, part of the said 12,400*l.* Belgian bonds. And he found, that by the said order of the 6th July, 1846, the defendant Cottee was ordered to deliver the said Belgian bonds to the person to be appointed receiver in the cause; and he found that a receiver was appointed on the 8th December, 1846. And he found that the defendant Cottee, at various times after such last-mentioned order, and before the 16th December, 1846, when the last of such sales and investments were made, sold the said Belgian bonds in portions, for various sums, amounting in the whole to the sum of 6,705*l.* 8*s.* and invested the various sums produced by such sales in bank 3*l.* 5*s.* per cent. annuities, which said investments amounted in the whole to the sum of 7,000*l.* 10*s.* 10*d.* bank 3*l.* 5*s.* per cent. annuities. And the said Master found that the 7,000*l.* 10*s.* 10*d.* bank 3*l.* 5*s.* per cent. annuities were, on the 15th January, 1847, pursuant to an order made in the cause, dated the 21st December, 1846, transferred into the name of the Accountant-General, in trust in the said cause, and constituted part of the said testator's personal estate; and the Master stated that he had allowed the said defendant the several sums, the proceeds of the said Belgian bonds, amounting in the whole to the sum of 6,705*l.* 8*s.*; but, save that he had allowed the said defendant the said last-mentioned sum of cash, he had not, having regard to the declaration contained in the said decree, given him any credit in respect of the said sums so invested by him in the purchase of the said 7,000*l.* 10*s.* 10*d.* bank 3*l.* 5*s.* per cent. annuities.

The reason given by the defendant for having sold the Belgian bonds, and invested the proceeds in the funds, after the order for the delivery of them to the receiver, was, that at the date of the order, namely, the 6th July, 1846, no receiver had been appointed; and inasmuch as a receiver could not be appointed until after the long vacation, and inasmuch as at that time, owing to events which were then taking place on the continent, the Belgian bonds were rapidly depreciating in value, he considered that it would be better to sell them at once, and invest the proceeds, which he accordingly did.

The Master had disallowed the defendant certain charges made by him for collecting rents, superintending alterations and repairs, surveying, travelling, and other expenses, and otherwise in the manage-

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ment of the testator's estate; and also certain charges which he made for valuing the testator's residuary personalty after the death of the testator's widow, in October, 1844. The Master had also allowed him only one per cent. in respect of his valuation of the testator's freehold and leasehold estates after the death of the widow, instead of one and a half per cent., which the defendant contended was the usual allowance. The Master had also refused to state specially certain circumstances which the defendant contended justified the investment in exchequer bills, which had been declared by the court to be improper; one of the circumstances upon which he relied being, as he stated, that the testator's estate was, at the time of his death, subject to very heavy liabilities, and it being desirable to have some portion of the assets in such a condition that they could be readily dealt with without loss of time, and the necessity of the concurrence of all the executors, one of them, Thomas Ingledew, being resident at a great distance from London. The defendant excepted to the report, and (amongst other things) took exceptions in respect of the matters lastly stated. The cause now came on for hearing on further directions, and on the defendant's exceptions.

*Campbell and Bagshawe*, for the exceptions. With respect to the charges disallowed by the Master. The defendant was an architect, surveyor, and appraiser, and was employed for some years by the testator before his death, who allowed him 5*l*. per cent. on receipt of rents and on letting of houses, and the usual surveyor's charges in other matters. In October, 1843, the testator wrote a letter to the defendant, asking him to be executor upon the terms of his being allowed to charge for his services. Cottee agreed to become executor on these terms, and thereupon the clause allowing the defendant to charge was inserted in the will. There were two classes of charges—the one was for valuing the estate of the testator after the death of the widow; this was clearly within the clause of the will; the other charges were made in respect of his duty as surveyor.

[*Sir J. Romilly, M. R.* Had he the authority or sanction of his co-trustees?]

It does not appear to have been specially given.

*Sir J. Romilly, M. R.* First, with respect to charges relating to the management of the testator's estate, the direction in the will appears to me to apply simply to the valuation and to the management of the testator's residuary freehold and leasehold estates. You must bring all the items within the clause of the will. His duty as an executor would bind him to do the acts in respect of which the charges are made. The meaning of the clause in the will is, that Mr. Cottee should be employed whenever it was necessary, not that Mr. Cottee should act whenever he thought fit. The acts done amount to no more than getting in the testator's personal estate. The exception on this head cannot be supported. Then, with respect to the allowance by the Master of one per cent. for valuing the testator's freehold and leasehold estates, that is a matter purely in the discretion of the Mas-

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ter, and this exception must be disallowed. As to the Master refusing to state certain matters specially, which the defendant says he ought to have so stated, it is settled that you cannot except because the Master has not thought fit to state special circumstances. The words in the decree are, that the Master shall, *if he thinks fit*, state special circumstances. All the exceptions must be disallowed, with costs, which costs may be set off against any costs which may be coming to him.

The exceptions having been disposed of, the cause came on for further directions.

*Lloyd and Selwyn*, for the plaintiffs, asked for a reference back to the Master to ascertain the balances from time to time in the hands of the defendant Cottee, and to calculate interest at 5*l.* per cent. on the balances. There was a direction in the will to accumulate the surplus income after the wife's death. This he has not done. This is a proper case to charge an executor with rests, and 5*l.* per cent, there being improper investments.

[Sir J. Romilly, M. R. I do not think that is so, unless you show that he derived benefit from it.]

But here there is an express direction to accumulate, so that he has been guilty of a direct breach of trust. In *Stackpoole v. Stackpoole* (4 Dow, 209) an executor retaining a large sum of money was charged with annual rests and interest.

[Sir J. Romilly, M. R. That was a very strong case. I am not sure that all the facts appear in that case.]

*Raphael v. Breton* (11 Ves. 92; 13 Ves. 507, 590) presented all the peculiarities of the present case. In both cases there was a neglect of investment and of accumulation. *Williams v. Powell*, 15 Jur. 393, s. c. 10 Eng. Rep. 224, is another case to the same effect.

[Sir J. Romilly, M. R. In *Williams v. Powell* I was of opinion that as the trustee had kept large balances in his hands, he being at the same time engaged in mining concerns, it must be taken that he had the benefit of such balances. The transactions in the present case extended over only two years. The widow died in October, 1844, and the fund was paid into court in July, 1846.]

The executor in this case has had the benefit of these large sums of money, which he has had in his hands. A party with large sums of money at his command has a great advantage on the Stock Exchange. The defendant ought to be fixed with the costs of the suit, except so far as they are the costs of administration.

*Roundell Palmer*, for the defendant George Knott, the heir at law of the testator.

*Campbell and Bagshawe*, for the defendant Cottee. Within nine months the defendant had realized and invested in government stock three fourths of the residuary personal estate, amounting in the whole to above 30,000*l.* All the debts have been paid; this appears by the Master's report. The other part of the residuary personal estate was

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retained by the defendant, there being large outstanding liabilities and several suits pending against the testator's estate; therefore he thought it proper to retain a fund which would be available at any time. Consols at that time being above par, he invested in exchequer bills. The estate is a gainer by the investments which have been made. In *Robinson v. Robinson*, 15 Jur. 255, s. c. 9 Eng. Rep. 69, the lords justices have laid down the rule for charging executors in cases of this kind. As to the balances, we are content to be charged with 4*l.* per cent. on the balances, but we contend that we ought not to be charged with 5*l.* per cent. and rests. It will be found that the estate was for a considerable period indebted to the defendant.

[Sir J. Romilly, M. R. My difficulty is as to the trust to accumulate, whether this was not a direct trust which you were bound to perform.]

The only direction to accumulate was with reference to the surplus income, after providing for the maintenance of the family. By the will, a sum not exceeding two thirds of the presumptive share of each child might be applied for its maintenance. By a codicil to his will the testator directed that 1,200*l.* a year might be applied for the support of an establishment for his children. By an order of the court the sum of 1,600*l.* had been allowed for maintenance. The trust for accumulation, therefore, would apply to a very small sum, and the court will not think fit in such a case to charge the executor with 5*l.* per cent. and rests. The fundamental cases as to charging executors with rests are *Raphael v. Breton* (11 Ves. 92; 13 Ves. 407, 590) and *Tebbs v. Carpenter*, (1 Mad. 200). As to costs, the bill was filed for the administration of the estate simply, and it prayed no extraordinary relief against the defendant.

SIR J. ROMILLY, M. R. This is the case of an executor who has a direct and positive trust to perform, which is, to invest and accumulate at compound interest the surplus income, after maintaining the family of the testator, and who has failed to perform this trust, but has made certain improper investments. It must be taken that these investments either were not made at all, or that they were made with the executor's own moneys. There must, therefore, be a reference back to the Master to ascertain the balances in his hands at the end of each year from the death of the testator, the first balance to be ascertained at the end of one year from the death of the testator; and the Master must compute interest on such balances. The usual course is to charge an executor, who has merely retained balances in his hands, with interest at 4*l.* per cent.; but if he has acted improperly, for his own benefit, or has used the money in trade, then he is charged with 5*l.* per cent. In this case I do not think there is such misconduct as to induce the court to charge him with 5*l.* per cent. He must, therefore, be charged with interest at 4*l.* per cent. on the balances. He must also be charged with annual rests, since he ought to have accumulated the surplus income; that was a trust which he ought to have performed. Upon the point how an executor was to be charged, there was a contest on the old cases. The case of *Robin-*

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Morgan v. Milman.

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*son v. Robinson*, 15 Jur. 255, s. c. 9 Eng. Rep. 69, before the lords justices, has, however, now settled the law of the court; and I adopt that rule in this case. With respect to the manner in which the executor is to be discharged in respect of the sums realized by the sale of the exchequer bills sold in pursuance of the order of the court, the court took possession of the exchequer bills as a security for so much property of the executor ear-marked, to make good his debt, and therefore the proceeds must be looked upon as a sum paid on the day of sale by the executor, and the Master must give the defendant credit for the sums so realized as on that day. With respect to the costs, up to this time there is nothing sufficiently important to induce the court to separate the costs of administration from the other costs—that is, with the exception of the costs of the exceptions. The costs also of the present reference as to the balances must be reserved. I am unwilling always to draw fine distinctions as to apportioning costs. Directions for this purpose are very often a greater burden to the parties than not apportioning the costs at all. Therefore, up to the present time, the defendant must have his usual costs, as between solicitor and client, out of the estate.

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MORGAN v. MILMAN.<sup>1</sup>

August 2 and 3, 1852.

*Specific Performance — Power, Defective Execution of.*

Lands were settled to such uses as A, and B, should, by a joint deed, executed in the presence of witnesses, appoint; and in default of appointment, to use in strict settlement, A, and B, being the first tenants for life in succession. In 1845, the S. W. Railway Company contracted with A, and B, for the sale of land, but the price was not fixed. In 1846, the company advanced part of the consideration money to them, on their joint receipt, in which it was stated that the money was "in respect of the lands, part of our estates, required for the purposes of the S. W. Railway Company." Before any formal exercise of their joint power by A, and B, A died. Afterwards other parts of the settled lands were contracted to be sold to the company:—

*Held*, first, that this was not such a contract as could be enforced against B.

Secondly, that the receipt was not such a defective execution of the power as would be aided in equity.

THE bill in this case was filed for specific performance of an alleged agreement, on the part of the South Wales Railway Company, to purchase part of the lands comprised in the settlement made upon the late Sir Charles Morgan and his family. The bill filed by Sir Charles stated that the late Sir Charles Morgan, the father of the plaintiff, was tenant for life in possession of these lands, and that the plaintiff was next tenant for life in remainder under the settlement. A joint

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<sup>1</sup> 16 Jur. 755.

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power of appointment was vested in the father and the son, by which they could acquire the fee for their own benefit. The plaintiff and his father contracted to sell the lands to the company, and for that purpose were about to exercise the power in their own favor, with the view of acquiring the fee, when Sir Charles Morgan, the father, died. The present plaintiff, however, called upon the company to complete, alleging that there was a defective execution of the power, such as would be aided in a court of equity. The company refused to complete except under a decree of the court. The question, whether the power had, in fact, been exercised, although defectively, by the late Sir Charles Morgan, was chiefly of interest to those claiming under the settlement, and under Sir Charles without reference to the settlement. If the power had been exercised, the purchase money would belong to the plaintiff absolutely; if the power had not been exercised, it would be subject to the trusts of the settlement.

*W. P. Wood, Rolt, and Woolley*, for the plaintiff, Sir Charles Morgan.

*Glasse and Milman*, for the parties claiming under the settlement.

*Osborne*, for the company.

The following authorities were cited and referred to: *Coventry v. Coventry*, 2 P. Wms. 222; *Campbell v. Leach*, Amb. 749; *Shannon v. Bradstreet*, 1 Sch. & L. 52; *Coles v. Trecothick*, 9 Ves. 234; *Blagden v. Bradbear*, 12 Ves. 466; *Pigott v. Penrice*, 2 Sugd. Pow. 168, 6th ed.; and 2 Sugd. Pow. 99.

Sir G. TURNER, V. C., in the course of the argument, referred to two unreported cases of *Wright v. Wright* and *Wright v. Woodhead*, where there was a question as to the effect of a contract to execute a power. There the contract was comprised in a few loose memoranda, but the consequential acts were clear. In *Wright v. Woodhead*, execution of the contract was decreed, but no direction was given as to what class of persons were to receive the purchase money.

Aug. 3. Sir G. TURNER, V. C. This was a bill by the present Sir Charles Morgan for specific performance of a contract with the South Wales Railway Company. The case was singularly circumstanced. By a settlement, the estates in question were settled to such uses as the late Sir Charles Morgan and his son (the plaintiff), should jointly appoint; subject thereto, to trustees for 500 years; then to the late and present Sir Charles Morgan successively for life, with remainder to the sons of the present Sir Charles Morgan in tail. There was a power in the settlement for the trustees (with consent of the late and present Sir Charles Morgan, or the survivor of them) to agree with any railway or canal company for the sale of any part of the settled lands, and for the consideration money to be paid for taking the same, and for the loss or damage which might be caused thereby. The settlement also contained the usual power of sale and

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*Morgan v. Milman.*

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exchange, and the moneys to arise from such sale were to be held for the same uses as the settled lands; so also as to the purchase-moneys of lands to be taken by any such companies under the above power.

In December, 1845, the South Wales Railway Company being about to pass through these estates, the late Sir Charles Morgan authorized his solicitor to negotiate with them for any part of the land which they might want. In March, 1846, the company gave the usual notices to take part of the land. A surveyor valued the part proposed to be taken at 8,000*l.* The company did not agree to this, but offered 7,500*l.* Pending this valuation, Sir Charles Morgan's solicitor wrote to the company's solicitor as to the title which the company would require, and he stated in his letter the joint power of appointment, and said, "he hoped, therefore, there would be no objection to the late and present Sir Charles Morgan receiving the purchase-money without procuring any further consents." As the company wanted the land, it was agreed that they should deposit in the bank a sum of money sufficient to cover the whole purchase-money demanded, and that thereupon they should be let into possession; the total amount of the purchase-money to be afterwards settled by reference, or by a jury. 8,000*l.* was accordingly so deposited, and the company was then asked to allow part of this sum to be paid at once to Sir Charles Morgan and the plaintiff. This the company refused, but afterwards intimated that 7,500*l.* would be paid out, on a receipt being given. Accordingly the following receipt (signed by the late Sir Charles Morgan and the plaintiff) was delivered to the company, namely: — "30th September, 1846. Received this day of the South Wales Railway Company the sum of 7,500*l.* on account of the compensation money to be ultimately fixed and to be paid by the said company in respect of the lands, part of our estates, required for the South Wales Railway." The 7,500*l.* was then transferred into the name of the late Sir Charles Morgan, and abstracts of the title to the lands were delivered, but nothing further was done until his death. Since then 20,000*l.* had been agreed to be given by the company for the above-mentioned land, and other lands included in the settlement. The first power of appointment was never exercised, and it was now gone by the death of Sir C. Morgan.

The plaintiff, who was his executor, and also one of the donees of the joint power, contended that the defective execution of the power would be aided by the court, and that he was entitled, against the company and the trustees of the settlement, to the purchase-money. The cases left no doubt that a valid contract for sale, which could be enforced against a donee of a power, would also be enforced against the remainderman, but the cases went no further. A mere intention of the donee of a power to sell under it would not bind the remainderman. Then is there in this case such a contract as bound the plaintiff, and can be enforced against him? I am sorry to say, that, in my opinion, there is not. The nearest approach to it is in the receipt for the 7,500*l.*; but the lands are not sufficiently described there; the words are, "lands, part of our estates;" but what lands were meant? This the document does not inform us. Parol evi-

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*Ex parte* The Mayor, Aldermen, &c., of Lincoln.

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dence cannot be admitted to explain the meaning, and the receipt is not so connected with the notices as to enable them to be referred to for the purpose. Independently of this, the contract was to sell at a price to be afterwards fixed. That price never was fixed, and therefore specific performance could not be had, and the remainder-man, under these circumstances, cannot be bound. The case of *Campbell v. Leach*, 1 Amb. 740, was much referred to in the argument. But it appeared from Sugd. Pow. (see App., No. 25,) that there were letters in that case which probably contained the contract. It is clear from the note in Sugden that the letters were written by the infant's father, and in all probability the case must have gone upon that. My conclusion, therefore, is, that on the whole of this case there is no such contract as I can enforce against the remainder-man; and therefore, perhaps, the strict course would be, to do no more than dismiss this bill. I will, however, if the parties desire it, direct a reference to the Master to inquire whether it would be proper for the trustees to adopt this contract with the company.

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*Re* THE GREAT NORTHERN RAILWAY ACT, 1851; *Ex parte* THE MAYOR, ALDERMEN, AND CITIZENS OF LINCOLN.<sup>1</sup>

December 20, 1851.

*Practice—Petition respecting the Application of Money belonging to a Corporation—Service.*

A railway company paid into court a sum of money for the purchase and severance of land taken by them belonging in fee simple to the mayor, aldermen, and citizens of L., and over which the freemen of L., 500 in number, had a right of pasturage. A special act was afterwards passed to enable the corporation to convey the land to the railway company free from these rights of common, and it enacted that the purchase-money was to be applied for the permanent benefit of the freemen of L., as the Court of Chancery should direct, by any order to be made in the matter of that act, and *ex parte* the mayor, aldermen, and citizens of L.; and seven days' notice of any such application was to be given, by affixing the same to the town hall:—

*Held*, that some of the freemen of the city of L., or the Attorney-General, ought to be served with the petition.

In June, 1847, the Great Northern Railway Company took possession of part of certain lands, called "The Holmes," belonging in fee simple to the mayor, aldermen, and citizens of Lincoln. On the same day the company paid 8,471*l.* 7*s.* 6*d.* into court, being the sum claimed as the purchase-money and compensation for the severance of the said lands. This sum was subsequently invested, in the name of the Accountant-General, in the purchase of 3*l.* per cent. annuities, to "The Account of the Mayor, Aldermen, and Citizens of the City of Lincoln. Holmes's Estate."

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<sup>1</sup> 16 Jur. 756; 21 Law J. Rep. (N. S.) Chanc. 621.



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*Ex parte* The Mayor, Aldermen, &c., of Lincoln.

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One of the Great Northern Railway Acts, passed in the 14 & 15 Vict., contained a section in the following words:—“Whereas the Great Northern Railway passes through a certain common or piece of waste land in the city of Lincoln, known by the name of ‘The Holmes,’ vested from time immemorial in the mayor, aldermen, and citizens of the said city, subject to the right of pasturage thereon throughout the year of the freemen of the said city residing within the same; and whereas the Great Northern Railway Company have taken possession, under the powers and provisions of the Lands Clauses Consolidation Act, 1845, of the part of the said common land required by them for the purposes of the said railway, and in respect thereof have paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, the sum of 8,471*l.* 7*s.* 6*d.*; and whereas the said mayor, aldermen, and citizens have contracted with the said company for the absolute sale to them of the land so taken by them, free from the aforesaid rights of such freemen, who are of the number of 500 and upwards; and whereas it is expedient that the said mayor, aldermen, and citizens should be enabled to convey to the said company the land so taken as aforesaid, free from the aforesaid common rights, and that provision should be made for the disposal of the purchase-money for the same: be it enacted, that it shall be lawful for the said mayor, aldermen, and citizens of the said city of Lincoln, and they are hereby empowered, by deed under their common seal, to convey to the said company and their successors such part of the said common or waste land as has been taken by them as aforesaid, and the fee simple and inheritance thereof, free from all and every the aforesaid rights of common upon and over such land; and that out of the aforesaid sum of 8,471*l.* 7*s.* 6*d.*, and any other moneys to be paid by the said company for or on account of the purchase of the said land, together with any interest or accumulations thereon, all costs, charges, and expenses of the said mayor, aldermen, and citizens, which shall have been incurred by them in or about or in anywise incidentally to the taking, sale, and conveyance of such land, and the appropriation and application of the aforesaid moneys, or any part thereof, or of the interest, dividends, and annual produce thereof, or of any part thereof, and which shall not have been discharged by the said company, shall be paid and satisfied; and in the next place, thereout such sum or sums of money shall be appropriated to the said mayor, aldermen, and citizens of the city of Lincoln, as the High Court of Chancery, by any order to be made in the matter of this act, and *ex parte* the mayor, aldermen, and citizens of the city of Lincoln, upon the application of the said mayor, aldermen, and citizens, shall order and direct, as and for compensation for all their rights and interests in such land so to be conveyed, and shall be disposed of accordingly, as moneys payable for lands purchased from corporations under the Lands Clauses Consolidation Act, 1845, are by that act directed to be disposed of; and that the residue thereof, and of all interest, dividends, and accumulations which have or shall have accrued or become due, shall be paid, invested, applied, appropriated, and disposed of

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in such manner, for the permanent benefit of all or any of the freemen for the time being of the said city of Lincoln residing therein, as the said court shall, from time to time, by any order to be made in the matter of this act, and *ex parte* the mayor, aldermen, and citizens of the city of Lincoln, upon such application as aforesaid, order and direct; provided, nevertheless, that seven days' notice of every such application as aforesaid so to be made by the said mayor, aldermen, and citizens, shall be given, by affixing the same on the outer door of the town-hall of the said city."

A petition was now presented by the mayor, aldermen, and citizens of the said city of Lincoln, stating the above facts, and that they had caused seven days' notice of the petition to be affixed to the outer door of the town-hall, and praying an inquiry as to the amount of the costs, charges, and expenses incurred by the petitioners in and about the sale of the land, and that the same might be paid out of the said fund; and that it might be referred to the Master, to inquire what further part of the said fund should be appropriated to the petitioners for compensation for all their rights and liabilities in the said Holmes's land; and also to settle a scheme for the application, appropriation, and disposal of the residue of the said fund, and the dividends to accrue due thereon, and all accumulations, for the permanent benefit of all or any of the freemen for the time being of the city of Lincoln residing therein. None of the freemen had been served with this petition.

*Baggallay*, for the petition.

Sir J. PARKER, V. C., said that it was a very special question what amount of the fund, if any, the corporation were entitled to; because, under the Municipal Corporation Act, all ordinary profits belonged to the freemen. The special act did not seem to direct that the order might be made *ex parte*, but "in the matter of that act, and *ex parte* the mayor, aldermen, and citizens of the city of Lincoln." His honor thought that any interest that was to be protected, ought to be protected properly; and as it did not appear that the freemen had appointed any committee to contract with the company for the sales, he did not think that he could make any order referring this matter to the Master, unless the Attorney-General were first served. The number of freemen being so large, his honor said that this was one of the cases in which the court would consider any *bond fide* selection as representing the whole. He did not like to make the order without hearing them upon it. He did not see what directions could be given to the Master, nor how it could be determined what proportion of the fund should go to the corporation. His honor thought that he should like, that, in this case, so many of the freemen should be served as would give a certainty that the body were fairly represented.

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Dunkley v. Dunkley.

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DUNKLEY v. DUNKLEY & others.<sup>1</sup>

July 9 and 10, 1852.

*Wife's Equity to a Settlement—Whole Fund given under the Circumstances.*

There is no rule of law or practice against this court decreeing the whole residue of a wife's fortune to be settled upon the wife and her children, but it is a matter purely in the discretion of the court; and in the present case, where the husband had received a large portion of his wife's fortune, and subsequently deserted her, the whole residue was decreed against the husband's assignees in bankruptcy, to be settled upon the wife and children, although by a post-nuptial settlement a considerable portion of the wife's fortune had been settled on the wife and children.

THIS was an appeal by the defendants from a decree of Sir J. L. Knight Bruce, late Vice-Chancellor, by which he declared that the plaintiff, Mary Dunkley, the wife of the defendant William Judkins Dunkley, was entitled to have the sum of 1,000*l.*, devised to her by the will of her father, Thomas Whitwell, settled and secured for the benefit of herself during her life, for her separate use, without power of anticipation, and upon her death for her children as tenants in common. The case came on upon the claim of Mary Dunkley, by her next friend, against her husband, William Judkins Dunkley, and his assignees in bankruptcy, and the trustees of the will of Thomas Whitwell. The claim stated, in substance, as follows:—Thomas Whitwell, the plaintiff's late father, by his will, dated the 1st October, 1824, devised a certain estate, in the parish of Crick, in the county of Northampton, to his wife, Sarah Whitwell, for life, remainder to trustees to preserve; remainder to the plaintiff, then Mary Whitwell, for life; remainder to trustees to preserve; remainder to any husband whom the plaintiff might marry, for life; remainder to trustees to preserve; remainder to the first son of his said daughter, in tail male. And the testator devised his estate at West Haddon, in the same county, unto his said daughter in fee; and he bequeathed to his trustees, the defendants Lovell and Heygate, the sum of 1,000*l.*, part of his personal estate, to be invested by them in the public funds, the interest thereof to be paid to his wife, Sarah Whitwell, during her life; and he bequeathed all the residue of his personal estate to his said daughter absolutely.

In 1825, the plaintiff intermarried with William Judkins Dunkley, but no settlement was executed on that occasion. In October, 1826, the testator died, and the trustees of his will, who were also executors, and had proved the will, set apart and invested the 1,000*l.* upon the trusts of the will. Immediately upon the death of the testator, William Judkins Dunkley, in right of his wife, entered into possession of the West Haddon estate, and received from the trustees of the will all the residuary personal estate of the testator, except the sum of

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<sup>1</sup> 16 Jur. 767.

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3,000*l.*, (which residue, as appeared from the evidence, amounted to about 2,000*l.*), which sum of 3,000*l.* was, in pursuance of an agreement before marriage, as it was alleged in the claim, but of which there was no direct proof, by an indenture dated the 21st August, 1826, settled upon trusts for the benefit of the plaintiff and her said husband, and the issue of the said marriage. No settlement or provision was ever made by the husband out of his own property.

In 1830, the husband being in pecuniary difficulties, the plaintiff joined him in mortgaging the West Haddon property, and in 1834, that property was sold by the mortgagee, when it realized the sum of 4,800*l.*, all of which was spent in payment of the mortgage and other specialty debts of the husband. In 1833 the husband became bankrupt. There were two children of the marriage, a son and a daughter. In 1838, the husband abandoned his wife and children, and has never since contributed to their support, and it was lately discovered that he had been for years living in a state of adultery. The plaintiff and her children resided with, and were partly supported by, the plaintiff's mother, Sarah Whitwell, from the time of the husband's desertion of them down to the time of Sarah Whitwell's death, which occurred in October, 1850, upon which event the plaintiff, as residuary legatee of her father, became entitled to the said sum of 1,000*l.* trust money. In February, 1851, the plaintiff obtained a divorce *a mensâ et thoro*, on the ground of adultery. Upon the death of Sarah Whitwell, the defendants, the assignees in bankruptcy of the husband, entered into possession or receipt of the rents and profits of the property at Crick, amounting to about 200*l.* per annum, and also applied to the trustees of the testator for the payment of the said 1,000*l.*

The claim stated that the income arising from the 3,000*l.* settled by the indenture of 1826, was not sufficient for the due and proper maintenance of the plaintiff and her children, and it claimed to have the whole of the said sum of 1,000*l.* settled upon herself and her children. In the affidavits filed on the part of the husband's assignees, in opposition to the claim, it was stated that the husband had laid out, in the erection of a house and buildings upon, and in improving the estate at West Haddon, upwards of 7,000*l.*, and that his father, Thomas Dunkley, had become the purchaser of the property at the said sum of 4,800*l.*, and that he had by his will devised it to his wife, Elizabeth Dunkley, for her life, with remainder to the plaintiff for her life for her separate use, with remainder for the benefit of the children of the plaintiff and the said William Judkins Dunkley; and that the said Thomas Dunkley died in December, 1837, without revoking his will, and that his said widow, Elizabeth Dunkley, is seventy-three years of age; and that the property at West Haddon is worth 190*l.* per annum; and that the bankrupt's interest in the property at Crick was sold for 800*l.*, that the amount of debts proved against the bankrupt was upwards of 7,000*l.*, and that only one dividend had been declared of 10*l.* in the pound; and that the whole amount of the 4,800*l.* purchase-money was swallowed up by the costs and the incumbrances. In reply to this, it appeared upon affidavit, that 2,000*l.*, part of the 4,800*l.* purchase-money, remained secured upon the West Haddon

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property; and it further appeared that the plaintiff would be obliged to pay at least 150*l.*, the costs of the suit in the ecclesiastical court, her husband being unable to pay them, as he was ordered. The Vice-Chancellor directed the whole 1,000*l.* to be settled on the wife and children. The assignees of the husband appealed from that order.

*Bethell* and *Leach*, for the plaintiff, cited *Gardner v. Marshall*, 14 Sim. 575; s. c. 9 Jur. 958; *Elliott v. Cordell*, 5 Mad. 149; *Gilchrist v. Cator*, 1 De G. & S. 188; s. c., 11 Jur. 448; and *Scott v. Spashett*, 3 Mac. & G. 599; s. c. 9 Eng. Rep. 265; and submitted that the settlement that had been here decreed only amounted, together with the 3,000*l.* that had been previously settled, to a fair proportion of the wife's fortune; and contended that it was always a matter of discretion in the court whether it would settle the whole of the fund in question upon the wife and children, or only a portion; but that in several of the later cases, where the husband had deserted the wife, the court directed the whole to be settled.

*Schomberg* and *C. Burton*, in support of the appeal, cited *Green v. Otte*, 1 Sim. & S. 250; *Napier v. Napier*, 1 Dru. & W. 407; and *Vaughan v. Buck*, 1 Sim. (n. s.) 284; s. c. 3 Eng. Rep. 135; and contended that no case was to be found in the books in which it was decided, that where the wife had any property settled to her separate use, as there was here, the whole of the fund should be settled upon the wife; but that in every such case the most that the court has given the wife has been a moiety, or at the utmost three fourths, always giving to the creditors of the husband a substantial portion; that here the bankruptcy of the husband took place before his desertion of his wife, and his other improper conduct, and that therefore his creditors ought not to suffer from that subsequent conduct; that, in fact, many of the debts of the husband had been incurred by his expenditure upon the West Haddon property; that it was very desirable that the court should lay down some clear and distinct rule in these cases as to the proportions in which a fund should be divided between the wife and the husband, or his assignees, for that at present counsel were wholly unable to advise their clients; so that in all these cases litigation became absolutely necessary.

*Bethell*, in reply.

LORD CHANCELLOR, (Lord St. Leonard's). I have been much pressed in the course of the argument, by the counsel for the appellants, to lay down some rule of proportion in these cases, or, in other words, to take away all discretion from the judge as to what particular portion of the property shall go to the wife, and what to the husband or his assignees, so as, it is said, to enable counsel to advise their clients with certainty in like cases. No person can be more anxious than I am, that, when it is possible, clear and distinct rules should be laid down for the guidance of the profession; at the same time I must remark, that in every case, as in this, where a certain discretion is

reposed in the judge, he is bound to apply his mind to the circumstances of the particular case, and to exercise his discretion accordingly.

In references to the Master in these cases he had always to exercise a discretion as to what was a proper portion of the fund to be given to the wife, and what to the assignees of the husband; and when I am asked to take away from the court that discretion, I am asked to do that which is no more in the power of the court to do than it is in its power to vary a stringent rule of law. I was sorry, therefore, to hear the language that was addressed to the court upon this subject. A judge sits under the solemn sanction of the court not to decide these cases according to inflexible rules of law, but to decide them according to law and the discretion which is reposed in him. In the present case I have a discretion, and I am called upon to exercise it according to the rules of this court. Now, I must first see what those rules are. No person can dispute this, that, according to the old practice of the court, the fund used to be divided nearly even between the wife and the assignee. I believe that I rather set the example, when in Ireland, of saving the parties the expense of an unnecessary reference; and in *Napier v. Napier*, out of 1,000*l.* I gave 600*l.* to the wife and children, and 400*l.* to the assignees of the husband, which I considered met the justice of the case.

Some cases have been cited as establishing a rule which forbids me to give to the wife the whole of the fund. Now, there is no denying that Lord Eldon was of opinion, that where the wife files a bill for a settlement, she could not have the whole fund; but since that time the court has frequently decided, that, under certain circumstances, it was proper to give the wife the whole of the fund. In *Green v. Olte* it was contended by the counsel for the assignees of the husband, that in the reference to the Master to approve of a proper settlement upon the wife, the Master should not be directed to have regard to any other property which the husband might have possessed in right of his wife; but there the Vice-Chancellor said, "Upon a reference to the Master to approve of a proper settlement upon the wife out of a particular property, it is always usual to direct the Master to have regard to any settlement which the husband may have made upon the wife *aliunde*. If the extent of the provision for the wife out of the particular property in question is to be affected by any prior settlement of other property made by the husband, it necessarily follows that regard must also be had to any other property possessed by the husband in right of the wife . . . regard must be had to the extent of the wife's fortune." In *Gardner v. Marshall* the husband had received from the wife's family large sums of money, amounting to upwards of 6,000*l.*, and the residue in question was about 5,000*l.*, and the Master was of opinion, that, having regard to all the circumstances of that case, the whole of the income of this residue should be given to the wife for her life, to her separate use. That came before the late Vice-Chancellor of England upon the exceptions of the husband's assignees; and he said in that case, "It may be true, where property has accrued to a married woman, and

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the question has arisen simply as to the amount of the settlement to be made on her out of it, that there is no case in which the court has refused to give the husband a portion of it. But where, as in the present case, the husband, prior to the question arising, has received, or in any other manner had the benefit of, a large portion of his wife's fortune, the question which the court has to determine is a different one, namely, what is to be done with the remainder." Now, without relying on the particular circumstances of that case, which I think justified the decision there, I refer to it to show, that where peculiar circumstances have concurred, the court has exercised its discretion and authority, and given the whole to the wife. In *Gilchrist v. Calor* the sum was very small, and not sufficient for maintenance, and the court gave the whole to the wife.

These are conclusive authorities to show that the court has the power to give the whole. *Scott v. Spashett* was a very strong case, for it was the case of an assignment to a particular assignee, by the husband and wife, of the wife's reversionary interest, and as against this particular assignee the whole fund was given to the wife. In *Vaughan v. Buck* the court thought that giving two thirds of the fund to the wife would meet the justice of the case. It is clear, therefore, that the judges have had to consider, not to what extent they were called on to unsettle any established rule, which might give rise to the objection as to the impossibility of counsel advising with any certainty, but to consider all the circumstances of the case, and to decide what really was just and proper to be done. [His lordship then went through the facts of this case prior to the death of Sarah Whitwell, and continued]: Then, in 1850, the tenant for life died, and the assignees of the husband came into possession of his life interest in the property at Crick; and if we call that equal to 1,000*l.*, we do not much exaggerate it; and at the same time, this 1,000*l.* which is in dispute, fell into the residue of the testator's estate; and Sir J. L. Knight Bruce, when Vice-Chancellor, thought that he was not exceeding his duty by giving the whole of that 1,000*l.* to this lady, she having been deserted by her husband, and having for her support, and the support of her two children, the miserable pittance secured by the settlement. The assignees of the husband cannot have a higher right than the husband himself had, and they have no right to put themselves forward as having a moral claim against the wife. I entirely concur with the court below in giving the whole of this fund to the wife and children, as directed by the decree, and dismiss the appeal, with costs.

*Appeal dismissed, with costs.*

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Harwood v. Burstall.

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HARWOOD v. BURSTALL.<sup>1</sup>

March 22, 1852.

*Practice—Costs of Suit rendered necessary by Default of one of the Parties.*

Where a suit has been rendered necessary by the conduct of one of the parties in not carrying an agreement into effect, he will not be fixed with the costs of that suit unless it is shown that all requisite and proper steps were taken by the other parties to the agreement, and that the party sought to be charged had notice of their intent to institute the suit, and to seek to fix him with the costs of it.

THIS was a suit for the specific performance of an agreement for partition which had been entered into by the four residuary devisees under the will of a Mr. William Bradwell. The testator died in 1839, and the testator's widow, who was tenant for life of the property in question, died on the 30th January, 1844. In April, 1845, the four residuary devisees who became entitled to the property on the death of the tenant for life, of whom the defendant Edmund Bramwell was one, came to an agreement for partition of the estate, and the necessary deeds were accordingly prepared, but upon their being tendered to Edmund Bramwell for his signature, he refused to execute them. The present suit was accordingly instituted for the purpose of compelling a specific performance of the agreement for the partition. It appeared that the reason assigned by Edmund Bramwell for refusing to execute was, that certain deeds had not been produced.

*Campbell and Randell*, for the plaintiffs, asked that the defendant Edmund Bramwell might be decreed to pay the costs of the suit, the suit having been rendered necessary by his conduct.

Sir J. ROMILY, M. R. I am quite clear that no case has been made here for making Edmund Bramwell pay the costs of the suit. It is true there was an agreement for a partition, but the defendant refused to execute the necessary documents in consequence of the non-production of certain deeds. To fix a person with the costs of suit occasioned by his non-performance of a contract, it must be shown that the deeds were properly tendered to him for execution, and that he was informed that unless he did execute them a suit would be instituted for the purpose of compelling him, and that it would be sought in that suit to fix him with the costs of it. It does not appear that that course has been pursued in this case, and I cannot fix him with the costs.

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<sup>1</sup> 16 Jur. 770.



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 Kemp v. Latter.
 

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**KEMP v. LATTE<sup>1</sup>**

June 3, 1852.

*Practice—86th Order of May, 1845—Service of Office Copy of Decree taken pro confesso—Time for showing Cause against Decree pro confesso.*

IN this case the bill had been taken *pro confesso*, and a decree made thereon against the defendants Alexander Davidson Kemp, John Biss and Eliza Sarah his wife, and James George Kemp, all of whom were resident in India. The original cause was heard on the 23d March, 1852. A supplemental suit had since been instituted, and an order had been obtained to serve the defendants in India. Under the 86th Order of May, 1845, a defendant, against whom a decree has been taken *pro confesso*, should be served with an office copy of the decree, (unless the court dispenses with service thereof), and if the decree be not absolute, such defendant or his solicitor, is to be at the same time served with a notice to the effect, that if such defendant desires to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the court within the time specified in the notice, or that such defendant will be absolutely excluded from making any such application.

*Hetherington* now applied for leave to serve a notice, under the 86th Order of May, 1845, on the defendants in India, limiting the time within which they should be at liberty to apply for permission to answer the plaintiff's bill and set aside the decree to the same time within which, by the former order, they were to answer the supplemental bill—that is to say, as to such of the defendants as were at Calcutta, within seven months after service of the notice, and as to one of the defendants who was in the Punjaub, within eight months after service of the notice; and he submitted that as these defendants had already been served with the original bill, and as they would now be served with a copy of the supplemental bill, in which the decree in the original suit was fully stated, this was a case in which the court would, in the exercise of the discretion given to it by the 86th Order, dispense with service of an office copy of the decree.

Sir J. ROMILY; M. R., thought that this was a case in which the court might safely dispense with service of an office copy of the decree, and made the order as asked for, limiting the time for showing cause against the decree to the same periods as were limited for entering appearance to and answering the supplemental bill. See *Trilley v. Keefe*, 16 Jur. 442; s. c. 10 Eng. Rep. 293.

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<sup>1</sup> 16 Jur. 770.

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*In re* The Monmouthshire and Glamorganshire Banking Company.

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*In re* THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849; and *In re* THE MONMOUTHSHIRE AND GLAMORGANSHIRE BANKING COMPANY; *Ex parte* CAPE'S Executor.<sup>1</sup>

July 29, 1852.

*Contributory — Contract — Period of Commencement of Liability.*

By the deed of settlement of a company it was provided that every person being a purchaser in respect of any shares of the capital of the company, and every person being an executor or administrator of any deceased proprietor, should, as to all duties, obligations, claims, and demands upon or against him in respect of shares so to be purchased by him, or which should become vested in him as such executor or administrator, be considered a proprietor in the company from the time of the shares being so purchased, or being so vested in him as aforesaid; and also, that whenever, by any means whatsoever, any shares in the capital of the said company should be duly and effectually transferred to a new proprietor, then, and in such case, and not before, the responsibilities of the previous owner, as a proprietor in the company in respect of such shares, should cease and determine, and such previous owner should be exonerated and discharged from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements of the partnership deed. By another clause a reserved surplus fund was created, for the purpose, amongst other things, of meeting any unforeseen emergencies, losses, or extraordinary demands on the company; and by another clause it was expressly declared that every transfer should carry with it the profits and share of capital, and surplus reserved fund, in respect of the transferred shares: —

*Held*, that under the terms of the deed, the transferee of shares was, in respect of the transferred shares, subject to all the liabilities of the company, as well those incurred before as after the date of the transfer; and a motion by the executor of a deceased shareholder to discharge or vary the order of the Master, who, under an order for winding up the company, had placed his name on the list of contributories, and had made a call upon him in respect of the shares held by his testator, on the ground that some of the debts and liabilities in respect of which the call had been made were incurred before the transfer of the shares to his testator, was refused.

THIS was a motion on behalf of John Ebenezer Davies, the executor of John Cape, deceased, that the decision of Master Farrer, contained in a certificate or order dated the 12th June, 1852, whereby he ordered that the said John Ebenezer Davies, as executor of the said John Cape, should be placed on the list of contributories of the above-mentioned company for 105 shares, might be discharged or varied; and also that the order of the Master dated the 12th June, 1852, whereby he peremptorily ordered that a call of 60*l.* a share on the said 105 shares should be made on the said John Ebenezer Davies, as representative of the said John Cape, and that he should, on the 5th July, 1852, pay to the official manager of the said company, out of the assets in his hands, as personal representative of the said John Cape, in a due course of administration, the balance, if any, which should be due from him as such personal representative, after debiting his account on the company's books with such call, might be discharged or varied; and that the costs of and incident to the decision and order of the Master, and of and incident to this application, might be paid by the official manager out of the assets of the company. An

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<sup>1</sup> 16 Jur. 787.

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*In re The Monmouthshire and Glamorganshire Banking Company.*

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order having been obtained, on the 13th January, 1852, for winding up the affairs of the above-mentioned banking company, the official manager carried in a list of the members and contributories of the company, and included in such list the name of Mr. John Ebenezer Davies, in his character of personal representative of John Cape, for 105 shares, and the Master included John Ebenezer Davies in class C of the list of contributories of the company as such personal representative in respect of such shares; and on the same 12th June, 1852, the Master peremptorily ordered that a call of 60*l.* per share should be made on all the contributories of the company whose names had been included in class C of the list of contributories as personal representatives of deceased members of the company, and that such calls should be paid on the 5th July, 1852. It appeared that Mr. Cape was the transferee of all the 105 shares in respect of which Mr. Davies had been made a contributory, having purchased fifteen of such shares on the 4th October, 1841; thirty-five more of such shares on the 28th October, 1841; fifteen other of such shares on the 30th November, 1841; twenty more on the 4th December, 1841; and the remaining twenty of such shares on the 8th December, 1846. It appeared that some of the debts to which the company were now liable, and which had been proved against the company, and which were proposed to be paid in the course of winding up the affairs of the company, had been incurred previously to the dates of the transfers of some of the shares to Mr. Cape, and it was now contended on behalf of Mr. Davies that his liability as representative of Mr. Cape extended only to debts and liabilities of the company which had been incurred or had arisen after the transfers of the shares to Mr. Cape, and that therefore the Master was wrong in adjudicating him to be liable, in respect of all the shares held by Mr. Cape, to all the debts and liabilities of the company, whether incurred before or after the transfer to Mr. Cape. The clauses in the deed of settlement which were referred to or relied upon in the argument and in the judgment were the 32d, 54th, 57th, and the 60th. These clauses were as follows:—

32. "That so much of the profits of this company which shall be made for the period ending the 31st December, 1836, as the directors in their discretion deem expedient, shall be retained, and form part of a fund, to be called 'The Reserved Surplus Fund;' and in each succeeding year during the continuance of this company the net profit which shall arise or accrue to the company, after setting apart such proportion, not exceeding one fourth part, of the said net profits as the directors for the time being shall think requisite for maintaining the said surplus fund, shall be divided amongst the proprietors in proportion to their respective shares; but no such part of the said net profits shall be set apart for the purpose aforesaid, if by reason thereof the dividend made for the current year would be reduced to less than 4*l.* per cent. per annum on the then paid-up capital of the company, and the surplus fund for the time being shall be carried to a separate account in the books of the company; and the said surplus fund is hereby declared to be as well a reserved fund of capital to meet any unforeseen emergencies, losses, or extraordinary demands upon the

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company, as also a reserved fund of profits for the purpose of supplying from time to time any deficiency which, from unforeseen circumstances, may arise in the profits of any year, and of preventing, as far as may be, a fluctuation in the amount of the dividends of successive years; and the said surplus fund shall and may be applied for the several purposes aforesaid by the directors, in their absolute discretion; and the said fund shall, on the dissolution of the company, belong to and be divided amongst persons then entitled to the capital, in the same shares as they shall be entitled to such capital."

54. "That the husband of any female proprietor, or the executor, administrator, or legatee of any deceased proprietor, shall not as such be a proprietor in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively; but any such husband, executor, administrator, or legatee shall be at liberty to dispose of such shares in manner and subject to the provisions herein expressed and contained, or at his option to become a proprietor in respect of such shares, first giving notice, in writing, at the banking-house of the company at Newport, of such his desire, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the proprietors in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a proprietor; whereupon, and upon otherwise complying with the provisions herein contained, he shall be admitted a proprietor in the company in respect of such shares, and have the same transferred accordingly, and shall be personally charged with the duties and liabilities incident to the ownership of the same. But any such husband, executor, administrator, or legatee, who shall not, under the provisions hereinbefore contained, elect to become a proprietor in the company in respect of the shares vested in him in such capacity, and also the assignee of every bankrupt or insolvent proprietor, but shall sell and dispose of the shares so vested in him in any such capacity as aforesaid, and every such representative as last hereinbefore mentioned, shall be entitled to receive any dividend which shall have become due on the shares which shall be so sold by him before his title to the same shares accrued; but no dividend, which shall have become due on the same shares since his title shall have accrued, shall be receivable or demandable by him, but, till some person shall have become a proprietor in respect of the same shares, shall remain in suspense; and every transfer shall carry with it the profits and share of capital, and surplus and reserved fund, in respect of the shares transferred, so as to close all the right and interest of the party or parties making such transfer in respect of such sold share or shares."

57. "That every person who, being a purchaser of any shares in the capital of the company, shall take a transfer or assignment of such shares, and shall not previously to such purchase have executed or otherwise acceded to these presents, and every person who, being the husband of any female proprietor, or the executor, administrator, or legatee of any deceased proprietor, shall, by notice in writing as aforesaid, signify to the directors, for the time being, his desire to become a proprietor of the company in respect of the shares vested in

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him in such capacity, and shall not, at the time that the said shares vested in him in such capacity by the means aforesaid, be a recognized proprietor in the company in respect of any other shares in the capital, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a proprietor in the company from the time of the shares being so purchased by, or being so vested in him as aforesaid; but as to all profits, rights, privileges, benefits, and advantages to arise from the said shares, no such person shall be considered a proprietor in respect of the same until he shall have executed or otherwise acceded to these presents."

60. "That whenever, by any means whatsoever, any shares in the capital of the company shall become actually forfeited, or shall be duly and effectually transferred to a new proprietor, then and in such case, and not before, the responsibilities of the previous owner, as a proprietor in the company in respect of such shares, shall cease and determine, and such previous owner shall be exonerated and discharged from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements of these presents in respect of the same shares."

The transfer deed which was in use in the said company on the occasion of the transfer of shares in the company was as follows:—"This indenture, made the — day —, between — (the assignor of the shares hereinafter mentioned) of the first part, — (managing director of the Monmouthshire and Glamorganshire Banking Company) of the second part, — (the assignee of the same shares) of the third part, and — and — (trustees on behalf of the company of proprietors of the said banking company) of the fourth part, witnesseth, that the said assignor, in consideration of the sum of £ — to him paid by the said assignee, doth, with the consent and approbation of the general board of directors of the said company, testified by the execution of these presents by the said managing director, hereby grant, assign, and transfer unto the said assignee all those — shares of him, the assignor, in the capital stock of the said Monmouthshire and Glamorganshire Banking Company, now standing in the name of the said assignor, in the books of the said company, and all dividends, benefit, and advantage accruing from or incident to the same shares, to hold the same unto the said assignee, his executors, administrators, and assigns, subject to the covenants and stipulations contained in the deed of settlement of the company, bearing date the 1st August, 1836; and the said assignor doth, for himself, his heirs, executors, and administrators, covenant with the said assignee, that, subject as aforesaid, the said assignee, his executors, administrators, and assigns, shall henceforth hold and enjoy the hereby transferred shares, and all the dividends and profits thereof, without any interruption from the said assignor, or any other person whatever; and the said assignor, and all other persons claiming under him, shall, on the request and at the cost of the said assignee, his executors, administrators, and assigns, execute to him or them any further reasonable assurances of the same shares; and the said

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assignee doth, for himself, his heirs, executors, or administrators, covenant with the said trustees, parties thereto, that the said assignee, his executors, administrators, and assigns, will observe all the covenants, articles, and stipulations contained in the said deed of settlement on the part of the proprietors of shares in the said company to be performed, as fully as if the said assignee had been party to and executed the same, and will, whenever thereto required by the general board of directors for the time being of the said company, execute the said deed of settlement, or any supplemental deed, to be prepared under the authority thereof, and any counterpart or duplicate of the same respectively. In witness whereof," &c.

*Roundell, Palmer, and W. D. Lewis*, for the motion. The question is, whether the proprietors whose names now appear on the register are liable to all the debts of the company, or only to such as have been contracted after the dates of the respective transfers to them. This depends on the terms of the deed of settlement as to the release of the transferor. The common rule in cases of partnership applies where there is no express stipulation between the parties to take the case out of the general rule. Here there is nothing to take the case out of the common rule. The liabilities in this case are governed by the 57th and 60th clauses of the partnership deed. By the 57th, a purchaser is, as to all duties, obligations, claims, and demands upon or against him in respect of the shares purchased by him, to be considered a proprietor only from the time of the shares being so purchased by him or being vested in him; and by the 60th it is provided, "that whenever, by any means whatsoever, any shares in the company shall be duly and effectually transferred to a new proprietor, then and in such case, and not before, the responsibilities of the previous owner in the company in respect of such shares shall cease and determine, and such previous owner shall be exonerated and discharged from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, stipulations, and agreements of these presents in respect of the same shares." The use of the words "subsequent" and "future" in this last clause clearly implies that the intent and meaning of the partnership deed was, that the previous owner should not be discharged from previous liabilities. [They referred to *Re The North of England Joint-stock Banking Company*, (*Sanderson's case*), 3 De G. & S. 66, 78.]

*Lloyd*, for the official manager. The doctrine contended for on the other side would lead to the greatest inconvenience. If that doctrine were to prevail, it would be necessary to draw a line at the date of every transfer, so as to ascertain the liability of each shareholder. But it is clear from the whole deed that such is not the proper construction. By the 32d clause a reserved surplus fund is created, for the purpose, amongst other things, of providing against any unforeseen emergencies, losses, or extraordinary demands on the company; and by the 54th clause it is expressly directed that every transfer shall

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*In re The Monmouthshire and Glamorganshire Banking Company.*

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carry with it the profits and share of capital, and surplus or reserved fund, in respect of the transferred shares. If, then the transferee is to take all the benefits of the surplus reserved fund, surely he must take the liabilities also. The 57th clause has been referred to, as showing that the transferee is not liable for liabilities incurred previously to the transfer; but that clause refers only to the period at which the transferee's liability is to commence, and has no reference whatever to the amount or extent of such liability. *Re The Oundle Union Brewery Company, ex parte Croxton*, 15 Jur. 893; s. c. 6 Eng. Rep. 93; and, on appeal, 16 Jur. 507; s. c. 11 Eng. Rep. 227. With respect to *Sanderson's case*, cited by the other side, the terms of the deed of transfer were not brought to the attention of the court; if they had been, the matter might have been decided differently. See *Re The North of England Banking Company, Dodgson's case*, 3 De G. & S. 85, 89, 90. Here the terms of the deed of transfer are such as to throw the entire liability, past and present, on the purchaser. He covenants to keep and observe all the covenants, articles, and stipulations in the same manner as if he had been party to and executed the deed of settlement.

*W. D. Lewis*, in reply. In order to vary the rule at common law as to the liability of partners, the terms of the partnership deed must be express. It is admitted by the other side that the 57th and 60th clauses are capable of two interpretations. In the 60th clause the words, "the responsibilities of the previous owner" shall cease, must be interpreted by the second part of the clause, which distinctly points only to claims and demands subsequently to the transfer. In *Ex parte Croxton*, referred to on the other side, the transferor was, by the terms of the deed expressly released from all debts. In this deed the word "debts" is not used.

Sir J. ROMILLY, M. R. The question in this case is simply a question of the construction of the contract between the parties. I think there is no difficulty on the subject. The 57th clause is, I think, perfectly clear. The meaning of that clause is, that the purchaser of shares shall be considered a proprietor as to all duties, obligations, claims, and demands in respect of the shares purchased from the time of his purchase; but as to all profits, or benefits, or advantages in respect of such shares, that he should not be considered a proprietor until he should have either executed the deed or have assented to it in some way or other. I have no doubt that the proper construction of the clause is to construe it as specifying the time at which the purchaser's liability commences, and when his right to the profits commences, but not as specifying what the liability of such purchaser is. The clause, I am of opinion, leaves such liability untouched; and, without doing violence to the language, it cannot, I think, be construed as specifying that the purchaser is not to be liable to debts and liabilities in respect of the purchased shares except from the time of transfer. By the 54th clause the purchaser of any shares is to have all the benefit of the reserved surplus fund in respect of his purchased

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shares. Now, this reserved surplus fund was a fund which was liable to the debts and liabilities of the company previous to such transfer, and the transferor was entitled to be exonerated by this fund from such liabilities. But by the transfer he is to lose all interest in this fund; and yet it is contended that he is to remain liable for all liabilities previous to the transfer by him. I think the 60th section is clear and distinct, that the responsibilities of the transferor should cease and determine from the time of the transfer; and I am of opinion that it was the intention that the exoneration should be as complete as by law it could be made. I think, therefore, that as between the partners themselves, the transferor is completely exonerated from the date of the transfer, although as to creditors he would not be exonerated until three years after the transfer. Moreover, in the deed of transfer, the purchaser covenants that he will observe all the covenants, articles, and stipulations contained in the settlement deed on the part of proprietors of shares in the company to be performed, as fully as if he had been party to and had executed the same deed. Under all these circumstances, looking at the terms of the covenant in the deed of transfer, and at the terms of the different clauses of the partnership deed, and considering that the purchaser has the full benefit of the reserved surplus fund, the only conclusion I can come to consistently with *Ex parte Croxton* is, that the Master in this case was right. The motion must, therefore, be refused, but without costs.

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 EDLESTONE v. COLLINS.<sup>1</sup>

April 22 and 23, and August 6, 1852.

*Copyholds — Married Woman.*

A surrender taken out of court of copyhold lands of a married woman, and requiring therefore her separate examination and consent, may be well taken by a deputy steward who is an infant.

THE question in this case arose in a suit for foreclosure of certain copyhold premises, held under the manor of Lyses. The defendant alleged fraud to have taken place with reference to the creation of certain mortgages now vested in the plaintiff. The case ultimately turned on the question, whether a surrender of copyholds by a married woman, taken by a deputy steward under the age of twenty-one, is valid or not. In 1844, Collins and his wife (she being separately examined,) surrendered out of court the premises in question, (which had previous to her marriage descended on the wife for an unincumbered estate in fee,) conditionally, for securing 50*l.* and interest to one Adcock. On the 3d December, 1846, upwards of 100*l.* being due

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<sup>1</sup> 16 Jur. 790.



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in respect of the said 50*l.* and further advances, Collins and his wife joined in a surrender of the equity of redemption, (and this was the surrender which was impeached,) to such uses and for such purposes, &c., and charged with such sums of money for the benefit of Collins, as Adcock should, by the direction of Collins, appoint; and in default of and until any such appointment, to the use of Adcock in fee, according to the custom of the manor, subject to the previous surrender of 1844, and also to a proviso, that if Collins, his heirs, executors, or administrators, should pay to Adcock, his executors or administrators, 100*l.* and interest, then this surrender was to be void. This surrender was presented by the homage, and entered on the court rolls on the 14th April, 1847. By several indentures of appointment and further charge, Collins covenanted at various times to pay 50*l.*, 50*l.*, 84*l.*, and 66*l.*, declaring and directing, on each occasion, that the copyhold premises in question should stand charged with these sums. On the 10th March, 1849, 542*l.* 5*s.* 1*d.* being then due on these several instruments, Adcock assigned his securities to the plaintiff by an indenture, in which Collins joined, Collins receiving a further advance, making the whole charge 600*l.* Collins died intestate in August, 1849, leaving the two infant defendants his co-heirs. Afterwards his widow married the plaintiff. It was proved that Bell, the deputy steward, by whom the surrender of 1846 had been taken, was then under the age of twenty-one years, having been born in February, 1826, and the surrender being taken in December, 1846. Bell had at the time just completed serving his articles with Mr. Adcock, the mortgagee; and these circumstances, it was alleged, together constituted a case of fraud. It was, however, proved, by the evidence of Bell himself, that he at the time fully explained to Mrs. Collins the nature and effect of the surrender of 1846.

*W. P. Wood* and *T. Smythe*, for the plaintiff, argued that the surrender was legally taken. An act done by a steward or his deputy *de facto*, though not *de jure*, is good. *Hippisley v. Tucke*, 2 Lev. 184; Co. Copyh. 104; 1 Scriv. 111. The only authority in favor of the view taken by the other side is the statement in Co. Litt. 3 b., and Hargraves's note, but this is expressly dissented from and overruled by subsequent decisions. In *Scambler v. Waters*, Cro. Eliz. 637, it is said, "An infant cannot be judged in a court as a steward in a court leet." But that carries the reason along with it; it is not said of every steward of every court, but only of the steward of a court leet, and the reason is given, because there the steward is a judge. The steward or deputy steward of a manor, in taking a surrender, acts not in a judicial, but in a purely ministerial capacity; and in the case of *Younge v. Stoell*, Cro. Car. 279, it is said, "An infant who can write and read Latin may be a registrar." Here the clerk, who had just completed his articles, was of competent information. See also this case in March's Reports, 72. In *Younge v. Fowler*, Cro. Car. 556, it is said, "An infant of three or four years old is not fit to do even a ministerial act, but where he is competent his act shall stand;" and the passage already referred to in Co. Litt. 3. b., was

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there expressly cited and overruled. The question is of very serious importance to stewards of manors, because the appointment of an unfit person to be a deputy works a forfeiture of their office. There are, perhaps, no other cases in point, but there are many analogous instances, *e. g.* of officers in the army sitting on a court-martial, though under twenty-one; and that is a judicial act. So also they may be witnesses to deeds and to wills, where their evidence may be required as to the sanity of the testator, of which they must be able to judge; or where the testator may be blind, and the will must be read aloud. There is no difficulty in drawing a line at what age infants shall be competent, and at what age incompetent; if at twenty, then why not at nineteen? if at fifteen, why not at fourteen? and so on; because the rule is laid down in *Younge v. Stoell*, that the skill or knowledge of the infant shall be the test of his competency. Another analogous case is such a case as *Zouch v. Parsons*, 3 Bur. 1794, where the deed of an infant was held good, he being a mere trustee. This case was approved by the present Lord Chancellor in *Allen v. Allen*, 1 Con. & L. 453. An infant may be clerk of the peace. *Crosby v. Hurley*, 1 Alc. & Nap. 431. In *Barrow v. Parrott*, 1 Mod. 246, a fine, taken by an ignorant carpenter, of an infant, was held good.

*Glasse and Beale*, for the defendants. The office of steward is an important one, and requires care and discretion. Such an office cannot be intrusted to an infant; and if an infant cannot be steward, he cannot be appointed deputy steward, since the deputy has to perform the same functions, and ought to have as great discretion and judgment; and this we find laid down by Lord Coke expressly in Co. Litt. 3, b., which is at least of as great authority as the passages which have been cited as overruling it. The taking the separate consent of a married woman especially requires discretion. Such consents are often taken in this court; but was it ever seen that your honor, or any of your honor's predecessors, ever permitted an infant to take such a consent in his stead? The taking of the surrender acquired no validity by being presented by the homage. The homage are not judges; they are bound to consider the acts done by the steward as rightly done, and to report them to the lord accordingly. [They referred also to the observations of Hale, C. J., in *Eyles case*, 1 Vent. 153.]

*W. P. Wood*, in reply. Even granting that any infant may not be a steward, yet he may be a deputy. One difference in their functions is, that the steward may appoint a deputy, which requires more than an infant's discretion. But a deputy has not this demand upon his intelligence — *delegatus non potest delegare*. Whatever may have been the practice of judges in equity courts as to appointing a deputy, the judges in the Court of Common Pleas very frequently do appoint deputies by *dedimus*, to take consents of married women; which shows that this is merely a ministerial function, since no judge can delegate his judicial functions. And an infant can exercise any ministerial functions except, first, those involving a liability to

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account; secondly, (formerly, but now, *semble*, exploded,) where the infant had to be sworn into his office; and, thirdly, where the minister had a right to appoint a deputy. Even if this surrender *feri non debuit*, yet *factum valeat*.

August 6. Sir G. TURNER, V. C. The only question which required any consideration, or was raised in this case, was, whether a surrender of copyholds by a married woman, taken by a deputy steward under twenty-one years of age at the time, was void by reason of the non-age of the person taking the surrender. The surrender impeached in the present case was a surrender by baron and feme, the feme being privately examined as to her consent by the deputy steward, who was at the time upwards of twenty years of age, and had for more than five years been clerk to a solicitor. Several cases and authorities have been quoted and examined at the bar, and I have taken an opportunity of going into them again, and I am of opinion that the surrender is not void. The argument that it was void went chiefly on *Scambler's case*, in which it appears to have been ruled by Popham and Fenner, that an infant could not be a steward, nor an under steward, the case being solely as to the capacity of an infant to be an under steward; and the authority of Co. Litt. 3 b. was also relied on as to the same effect. But these authorities were denied and overruled in the case of *Younge v. Stoell*, Cro. Car. 279, and *Younge v. Fowler*, Cro. Car. 556. In the former of these cases it was held by all the judges present, that the grant of the office of registrar to a bishop was good, notwithstanding the infancy of the grantee at the time of the grant; "that the grant was not void because he was at that time an infant, or because he cannot make a deputy; for an infant who can write and understand the Latin tongue may be a registrar, and may have sufficient knowledge to write and register acts, which is sufficient for his place; at leastwise, he may have sufficient knowledge to make an able deputy; and if he put in one who is insufficient, it is a cause of the forfeiture of his office." And in *Younge v. Fowler*, Cro. Car. 557 it is stated — "And as to this point, it was held by all the judges, that this grant of an office to an infant of the age of eleven years, '*exercendum per se vel sufficientem deputatum*,' as the usual grants are, is good, notwithstanding the infancy, and the opinion cited in Co. Litt. 3 b., and there stated to have been resolved in *Scambler v. Waters*, namely, that the grant of an under stewardship in possession or reversion to an infant is void. But this case was denied, unless it be with this difference, where it is granted, with such a clause to execute it, '*per se vel deputatum*;' for an infant may elect a sufficient deputy, and if he do not elect such, it is a forfeiture of his office; and a deputy is allowed, especially in ministerial offices, and to be approved of by the judges of that court; and as an infant may present to a church, because the ordinary gives the allowance whether the clerk be sufficient, so the lord of the manor or judge of the court is to give allowance of the deputy's sufficiency; and as an infant may well have an office descend upon him by inheritance, so he may as well have it by grant."

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And so in Co. Copyh. 45, it is said that an infant may be steward, for what he performs is incident to his place, and therefore his official acts shall not be avoidable by reason of his disability. But then it was said, that if an infant might be steward at all, it was only where the office was granted with a clause that it was to be exercised *per se vel deputatum*, and that then he could exercise it *per deputatum*; and this argument was supported by Co. Copyh., s. 46, in which it was said, "that a steward could not, without special words in his patent, make a deputy, unless in case of necessity: *e. g.*, as where the office descended upon an infant, then, without any special words in the original grant, he might appoint a deputy, for the law presumed him to be incapable of executing all the duties of his office himself." But the second passage from the copyholder was not inconsistent with its being shown that the deputy steward was of capacity to exercise his duties in person; and I think this is the true meaning of the passage in Coke's Copyholder, namely, that, without special words in his patent, a steward cannot appoint a deputy unless in case of necessity, as, *e. g.*, where the office descends upon an infant of such tender years as to be unable to perform the duties in person; and this is confirmed by what I have just read from Croke's report of the case of *Younge v. Stoell*, where it is said that an infant registrar may know how to write, and understand Latin, which may be sufficient learning for his office. Many other cases and analogies support this view. In particular I may remark, that an infant may be appointed executor, and afterwards have all the powers incident to that office; and formerly he might at seventeen have exercised almost all the powers of an ordinary executor. *Eyle's case*, 1 Vent. 153, was referred to, to prove that the office of steward was a judicial office. But this office of taking the separate examination of married women is, at any rate, not judicial, for if so it could not be delegated; but in practice it is constantly delegated, and the court acts on the report of the commissioners intrusted with that authority, without ever inquiring whether or not any of the commissioners might chance to be an infant. The surrender has been duly entered on the court rolls; and though it might have been impeached by a cross bill, upon a proper case being made out, yet in this suit, on the state of the pleadings, and on the circumstances now shown, I do not think I can accede to this request to treat the surrender as a nullity. There will be the usual decree in a mortgage suit as if this point had not been raised.

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Freeland v. Stansfield.

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FREELAND v. STANSFIELD.<sup>1</sup>

January 11, 1852.

*Partnership — Receiver — Bankruptcy.*

When one of two partners has become bankrupt in respect of his separate estate, and an official assignee and creditors' assignees have been appointed, and the partnership has been dissolved by the bankruptcy, the continuing partner is entitled to have a receiver of the partnership debts appointed in chancery, notwithstanding the 152d section of the Stat. 12 & 13 Vict. c. 106.

THIS was a motion for an injunction and receiver. The plaintiff, on the 1st of January, 1850, entered into partnership with Edward Leech, as surgeons, at Colchester, upon the terms of an indenture of that date made between them, of which the only provisions necessary to be mentioned were, that the plaintiff should pay to Edward Leech a sum of 900*l.*, and should have one third interest in the business, which was to continue for seven years. The business was carried on upon these terms until the 5th June, 1851, on which day Edward Leech was adjudged to be bankrupt in respect of his separate estate; and certain persons, who were named defendants in the bill, were appointed his official and creditors' assignees respectively. The plaintiff filed this bill against the official and creditors' assignees of the said bankrupt, stating the above facts, and that the plaintiff had paid the 900*l.* to Edward Leech, and that the partnership had been dissolved by the bankruptcy of Leech; and charging that he was, in fact, utterly insolvent at the time of entering into the partnership and receiving the 900*l.*; and praying that the partnership accounts might be taken, and the assets applied in payment of the debts, and also in repaying to the plaintiff a proportionate part of the said sum of 900*l.*; and for an injunction to restrain the defendants and their agents from taking any proceedings for the purpose of getting in, and from receiving or intermeddling with, any of the outstanding debts owing to the said partnership at the date of the bankruptcy of Edward Leech, and that the said plaintiff, or some other fit and proper person, might be appointed to receive, collect, and get in the same.

*Wigram* and *Giffard*, for the motion.

*Malins* and *H. Stevens*, for the defendants, objected that a receiver was unnecessary, the official assignee already appointed in bankruptcy being the most proper person to collect the debts, and it would be wrong to supersede him. They referred to the 12 & 13 Vict. c. 106, s. 152, which empowered the assignees in bankruptcy to sue for partnership debts in the name of the solvent partner; and to the cases of *Ex parte Farlow*, 1 Rose, 421, and *Ex parte Ellon*, 3 Ves. 288.

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<sup>1</sup> 16 Jur. 792.

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*In re The London and Birmingham Extension and Northampton, &c., R. Co.*

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Sir J. PARKER, V. C., said that it was impossible to contend that the bankruptcy of the partner could oust the jurisdiction of the Court of Chancery to appoint a receiver. His honor said that the provision in the bankruptcy act referred to in the argument was a very convenient one, but it did not apply to a case where the continuing partner was desirous of having a voice in the management of the estate. His honor made the order as asked, on the usual terms.

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*In re THE LONDON AND BIRMINGHAM EXTENSION AND NORTHAMPTON, DAVENTRY, LEAMINGTON, AND WARWICK RAILWAY COMPANY; Ex parte GAY.*<sup>1</sup>

February 9 and 10, 1852.

*Creditor — Action against Official Manager — Admissions.*

P., claiming to be a creditor of the above-named company, applied to the Master to be allowed to prove his debt in the winding up. The Master refused. On motion, the Vice-Chancellor referred it back to the Master, with a declaration that the debt, if any, due to P. formed a debt due from the company. The Master thereupon directed P. to bring an action against the official manager, and that upon the trial of that action certain admissions should be read in evidence, and that it should be admitted that the debt, if any, due to P. was a debt due from the company. On motion by a shareholder in the company, the court refused to discharge this order of the Master, but added a direction, that in case P. obtained judgment in the action, he should not deal with it in any way without leave of the court.

THIS was a motion, on behalf of Mr. John Gay, that the following orders of the Master engaged in winding up the affairs of the above-named company, dated the 21st March, 1851, and the 24th January, 1852, might be severally and respectively discharged, or that the same or either of them be varied in such manner as the court should think fit. The facts were, that Mr. Prichard demanded the sum of 4,551*l.* 9*s.* 8*d.* as due to him from the company. The Master allowed the demand as a claim only. Mr. Prichard thereupon applied that he might be at liberty to prove before the Master the particulars of his demand, but the Master did not think fit to comply with the application, and certified to that effect. Upon the motion of Mr. Prichard, Sir J. L. Knight Bruce, late Vice-Chancellor, on the 13th March, 1851, ordered that it should be referred back to the Master, with a declaration that the debt, if any, due to Mr. Prichard, formed a debt due from the company ordered to be wound up. The matter then came again under the consideration of the Master, and on the 21st March, 1851, he made the following order: — "I order and direct that the said William Bromley Prichard do bring an action at law, in her majesty's Court of Common Pleas at Westminster, against Henry Croysdill, the official manager of the above-mentioned company, for the recovery of the debt alleged by him, the said William Bromley Prichard, to be due to him from the said company for work and labor done and

*In re London and Birmingham Extension and Northampton, &c., R. Co.*

performed, and money laid out and expended by him, by and upon the employment of the general committee of management, in the due exercise of the duties of such committee, under the indenture of the 16th August, 1845, or such part of such alleged debt as he, the said William Bromley Prichard, may be advised. And I further order and direct, that on the trial of such action at law, the said William Bromley Prichard and the said official manager respectively be at liberty to read in evidence the admissions made in this matter on the part of the official manager and of the said William Bromley Prichard respectively, on the hearing of the application for the said order of the 13th March, 1851, designed by the solicitors for the said parties respectively, dated the — day of —, and that the said official manager shall admit that the debt, if any, due to the said William Bromley Prichard, as hereinbefore mentioned, forms a debt due from the said company. And I further order and direct, that the application of the said William Bromley Prichard to prove the said alleged debt before me, do stand over to abide the result of the said action at law. And I further order and direct, that the venue in the said action at law be laid in the city of London." On the 24th January, 1852, the Master ordered as follows:—"Memorandum. I have been this day attended by Mr. Joseph Brown of counsel, and Messrs. Han-ship & Co. as solicitors, for the official manager of this company, and by Messrs. Phillips & Sons as solicitors for William Bromley Prichard, upon the proposal of the said William Bromley Prichard to refer to arbitration the action directed by my order, dated the 5th March, 1851, to be brought by the said William Bromley Prichard against the said official manager. Now, upon considering the said proposal, I, John Elijah Blunt, Esq., the Master charged with the winding up of this company, do order and direct, that the said official manager shall be at liberty to consent, on the trial of the said action, that a verdict be entered for the said William Bromley Prichard, subject to a reference to the arbitration of a barrister at law, to be agreed upon between the respective counsel of the said William Bromley Prichard and the said official manager, or, in case of difference, by the court."

*Stuart, Hugh, Hill, and Cole*, now moved that these orders of the Master might be discharged or varied. They contended that this was not a company at all, and no action at law would have lain against them as a company for this debt, because it was not completely registered under the 7 & 8 Vict. 110, and till it was, it could not sue or be sued. *Beardshaw v. Lord Londesborough*, 21 Law J. Rep. (N. S.) C. P. 17; s. c., 7 Eng. Rep. 496; *Steward v. Greaves*, 10 M. & W. 711.

[Sir J. PARKER, V. C. The court has already declared by a former order, that if anything is due it is a debt from the company. The question is, whether any and what sum is due, and the Master has ordered that to be tried by an action. The main object of the action is to ascertain how much, if any, is provable under the Winding-up Acts.]

It is, then, declared a debt due from a company which never had any existence.

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*In re London and Birmingham Extension and Northampton, &c., R. Co.*

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[Sir J. PARKER, V. C. That might be a ground for contending that the judgment recovered should not be put in execution without leave of the court; it is within the power of the court to make such a declaration. My view of the Master's order is, that it was only intended to establish the quantum of the debt, for the purpose of proof in the proceedings before him.]

They argued further, that Gay was not liable for the debt, as the law was now understood; and that the Master's order, directing the action to be brought against the official manager, who was not legally liable, was not in conformity with Vice-Chancellor Sir J. L. Knight Bruce's order. Sections 50 and 58 of the act of 1848, and sections 57 and 91, were also cited; and *Re The Norwich Yarn Company*, 15 Jur. 211; s. c. 2 Eng. Rep. 118.

*Daniel and W. Morris*, for other contributories.

*Cooper and Swift*, for the official manager.

*Bacon and Glasse*, for Mr. Prichard, contended that the Master's orders were right, and that any variation of them would be unnecessary and improper. *Thompson v. The Universal Salvage Company*, 3 Exch. 310.

Sir J. PARKER, V. C. I do not feel very much doubt in this case. The Winding-up Act contemplates two totally different modes of proceeding on behalf of a creditor. One is, that he shall bring his action, and make what he can of his legal right, and the only restraint is that which is imposed by the 73d section, which requires that he shall not bring his action until after he has exhibited or made such proof of his debt or demand as he may be able before the Master. If he has taken that step, he is perfectly free to go on with his action, and it is an action which he brings according to the course of the court in which it is brought, each party being unfettered by any admissions, and it not being an action brought under the direction of this court at all. That is one way. The other way is, that the creditor comes in and makes proof of his debt as under a bankruptcy; he submits to the jurisdiction of this court under the Winding-up Act, and after the court has ascertained the amount of his debt, the Master may allow or disallow it as a claim only; and then a subsequent section provides for the way in which that debt is to be paid; first, out of the assets of the company, and then by means of calls on the different contributories. Then the 91st section, in order to give this court the aid of proceedings at law, for the purpose of ascertaining whether the debt is or is not a debt which ought to be paid under the Winding-up Act, gives the Master power to direct issues, or to direct actions to be brought, under the control of this court, for a totally different object from what is contemplated in that provision of the act, which provides that a creditor shall be at liberty, not to come into this court, but to make what he can of his legal remedy, and get judgment under his legal remedy; and he is at liberty, under the 57th section, to use the process of the court of law against the differ-



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*In re London and Birmingham Extension and Northampton, &c., R. Co.*

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ent contributories. Where he comes in under the other provisions to make proof and establish his debt, it may be by means of proceedings at law under the direction and control of this court, under the 91st section; the result of the judgment on that proceeding is not to give him any personal right against the contributories at all, and he can only get payment by means of administration in this court. Now, let us see what is the proceeding which has been taken in this case on behalf of Mr. Prichard. It appears that he moved this court on the 13th of March, 1851, that a certain order or certificate, by which the Master had certified that Mr. Prichard had come in before him and demanded a debt of 4,000*l.* and upwards, that the Master had allowed that debt as a claim only, and that application having been made to the Master that Mr. Prichard might be at liberty to prove before him the particulars of his demand, the Master did not think fit to comply with his request—that that order might be discharged; that it might be declared that Mr. Prichard was a creditor of the company within the meaning of the Winding-up Act, and that the Master might be directed to admit Mr. Prichard as such creditor to prove against the company his demand, or so much thereof as might be ascertained to be due to him; and that it might be referred back to the Master to ascertain the amount due to Mr. Prichard in respect of his demand as such creditor, or that such directions might be given for ascertaining the amount thereof as the court might direct. That is all to enable Mr. Prichard to come into this court and receive satisfaction of his debt by way of payment out of the assets of the company, and it is not in the least aimed at enabling Mr. Prichard, as an adverse creditor, to come into this court and make what he can of his legal rights, and to enable him to prosecute his legal rights. Viewing what had taken place before the Master, the court declared that the debt, if any, by and on the employment of the general committee of management, formed a debt due from the company, and provable under the order for winding up the company; and then it went back to the Master to ascertain what should be done upon that. Then Mr. Prichard went before the Master, on the 21st March, and his application to the Master was, that he might be at liberty to prove the debt due from the company, pursuant to the order of Sir J. L. Knight Bruce, late Vice-Chancellor, made in this matter upon the application of Mr. Prichard; and upon hearing that application the Master directed that Mr. Prichard do bring an action at law, in the Court of Common Pleas, for the recovery of the debt alleged by him to be due for work and labor, upon the employment of the general committee; and that upon the trial of that action the official manager shall admit the debt, if any, due to Mr. Prichard, as before mentioned, formed a debt from the company; and the Master further ordered, that the application of Mr. Prichard to prove his debt before the Master, should abide the result of the action at law. From that it appears most conclusively that the action is an action under the provisions of the 91st section, for the purpose of ascertaining what is the quantum of Mr. Prichard's demand, and for the purpose of giving him payment of it under the Winding-up Act. It appears to me, that in that view of

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the case, the Master was perfectly right in directing that that admission should be given, because that point was established in the winding up; that this debt, if it existed at all, was a debt of which Mr. Prichard was entitled to receive payment in the winding up of this company. Now, it is extremely likely, I think, that, according to the true construction of the Master's order, this court would not allow Mr. Prichard, even if there were no qualification of the order, having obtained judgment in the action which had been brought under its control in that way, to use it for another purpose, namely, for the purpose of enforcing personal demands against the members of the company. I think this court would not allow that, as the court would see that the question to be tried in that action would be a totally different question from the question which would have been tried if Mr. Prichard had simply sought to enforce his liability against the parties personally, without the assistance of this court. But I think that is a question which ought not to be left in doubt. When the court directs an action to be brought with admissions, and where it means that an action, which is begun under the control of this court, shall continue under the control of this court, I think it is the habit of the court to express that in the order, and to state distinctly that no execution shall issue on the judgment in that action without the leave of the court; and with that addition in the present case, it appears to me that the Master's order is perfectly right. Without that addition, I think the Master's order may lead to difficulty and embarrassment, and the more so, because it has been contended that the meaning of the court in directing this proceeding is to enable Mr. Prichard to get a judgment which he shall be able to enforce personally against the different contributories in case he succeeds at law. It must be added to the order, that in case Mr. Prichard shall obtain judgment in the action, he shall not deal with the judgment in any way without the leave of the court.

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*Ex Parte HOLME; In re THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.*<sup>1</sup>

May 8 and 31, and June 1, 1852.

*Contributory — Losses sustained before Transfer — False Balance-sheets.*

By the deed of partnership of a joint-stock banking company, the directors were ordered at every half-yearly meeting of the company to exhibit to the shareholders a balance-sheet containing a full, true, and explicit statement of the debts and credits of the company, and the assets thereof, and the profits and losses of the company, and all other matters and things requisite for fully manifesting the state of the affairs of the company; and every such balance-sheet should be binding and conclusive on all the shareholders, their executors, &c., unless some error should be discovered therein before the next half-yearly general

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<sup>1</sup> 16 Jur. 808.

*Ex parte Holme; In re The North of England Joint-stock Banking Co.*

meeting. By the clauses regulating the mode of transfer it was declared that the transferor should, from the date of the transfer, be released from all subsequent claims and obligations in respect of the shares, but that such release should not extend to release him "from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder." The directors for several years exhibited, at the half-yearly meetings, very erroneous balance-sheets, purporting to show that very large profits had been made; and they declared dividends, when, in fact, from the first, large losses had been sustained. A shareholder sold and transferred his shares with the consent of the directors, more than three years before the order for winding up the company:—

*Held*, that the losses to which a transferee of shares would be liable under the deed must be taken to mean such as appeared upon the balance-sheet; and that, as no losses appeared upon them, it was not competent, by other means, to show the existence of such losses; and that the balance-sheet was binding upon all the shareholders.

*Seem*, that losses cannot be said to have been sustained at the time of the loan or advance, but only at the time when the loan or advance turns out to be unrecoverable.

*Quere*, whether there could be losses within the meaning of the deed, to which a transferee would be liable, so long as any of the capital remained uncalled up?

THIS was an appeal by the official manager of the above company from an order of Sir J. L. Knight Bruce, late Vice-Chancellor, refusing a motion to reverse the decision of the Master charged with the winding up of the above company, whereby the Master had excluded the name of Thomas Holme from the list of contributories, as a contributory liable to contribute to the losses, if any, sustained by the company up to the 21st January, 1847, (the date of the transfer of his shares.) The case is reported in the court below, 15 Jur. 347, s. c. 3 Eng. Rep. 131, and the facts of the case, and the clauses of the deed of partnership upon which the question turned, are also fully stated in the Lord Chancellor's judgment. The question was shortly this:—the joint-stock company's partnership deed provided that a shareholder, upon duly transferring his shares to a new holder, should be exonerated from all subsequent demands in respect of the same shares, but that he should not be released from his portion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder. There were clauses in the deed under which it was obligatory upon the directors of the company to publish true and correct accounts half-yearly as to the fiscal state and value of the concern. The directors habitually published false accounts, showing that the concern was in a most profitable and flourishing state, when the real facts were, that in no one half year had the company made a profit, but invariably a very large loss. Thomas Holme, who was proprietor of forty shares, sold them to Mary Aitchison, and they were duly transferred to her, with the consent of the directors, on the 21st January, 1847. The directors did not on the occasion of the transfer make any claim upon Holme for contribution towards losses incurred previously; but upon the company being ordered to be wound up, more than three years after the transfer by Holme, the official manager sought to place him on the list of contributories, as above stated. The chief question was, whether the half-yearly published accounts were or not conclusive between the official manager and Holme, as to the non-existence of losses previous to the transfer. Another question was, whether money which had been advanced and lent by the company prior to the date of the transfer, but which was

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not ascertained to be lost until after the transfer, could be considered to be "a loss sustained by the company up to the period of his ceasing to be such holder."

*Bethell, Bacon and Prior*, in support of the appeal, contended that the circumstance of the false accounts that were furnished half-yearly by the directors must be treated in the ordinary way in which a common error by a common agent is treated, namely, that neither party can take advantage of it, and that no person could found an equity upon the fraud of a common agent; that the Vice-Chancellor had, in his judgment, treated this case as if it was a dispute between the *directors* and a particular shareholder, whereas it was between the official manager, who represents all the shareholders, and the particular shareholder; it was, therefore, a case where both parties were on an equal footing; and all trusting the common agent; that the fact was, that a very large portion of the losses of the company had been sustained prior to 1847, but that the Vice-Chancellor had held that the published accounts were decisive against the existence of losses antecedent to the transfer; but they submitted that these accounts were not decisive. They further contended that the shareholders had no reason to complain of those accounts, for that all the items of those accounts were true.

[LORD CHANCELLOR. True in *figures*, but not in substance. The greatest portion of what was stated on those accounts to form the assets of the company were not assets at all; they were bills, which were known by the directors not to be worth the paper upon which they were written.]

They then referred to the 45th and 69th clauses of the deed of partnership, and contended that it was not the duty of the directors to state upon the balance-sheets the full particulars of the real state of the assets, but that a certain discretion was placed in the directors in that respect; and they further contended that the losses arising from the bad debts must be considered as having been sustained at the time of the loan, and not merely at such time as it should turn out that they were not recoverable; and that in such case, as the greatest portion of the losses arose from these loans prior to the year 1847, and which were stated on the half-yearly accounts, Holme must be a contributory in respect of those losses, under the proviso in the 26th clause of the deed.

*Palmer and Bates*, for Mr. Holme, contended that there could be no losses, properly speaking, so long as uncalled capital remained sufficient to meet deficiencies, and that here only 20*l.* per share of the 100*l.* share had been called up, and that practically a shareholder selling his shares and retiring did bear any losses then incurred by the depreciated value which he gets for his shares; but that if any other effect was to be given to the terms of the proviso in the 26th clause, "losses, if any, sustained by the company up to the period of his ceasing to be such holder," they must mean as appearing from the half-yearly accounts, for that otherwise it would be practically

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impossible to give effect to it; and that as these accounts showed no losses, but the contrary, Mr. Holme could not be a contributory. They referred to Dodgson's case, 3 De G. & S. 85.

*Bethell*, in reply. Mr. Palmer's first argument only requires to be stated to answer itself; the effect of it would be to make the word "losses" mean something ultra the entire capital. In submission to what I conceive your lordship to have decided, I give up my point, that the loss must be considered to have been sustained at the date of the advance, and I admit that it must be considered as sustained only at the time when it ought to have been written off. Then I submit that these two points are clear—first, that "losses sustained" must receive a natural interpretation; secondly, that the court has enough before it to conclude that a very serious amount of loss was sustained while Holme was a shareholder. I submit that no person can complain of the half-yearly accounts, but Mrs. Aitchison, the transferee; and that as between the other shareholders and Holme, Holme is liable as a contributory for losses sustained prior to his transfer.

[He referred to a case of *Ex parte Barnard*, before Sir J. Parker, V. C., on the 16th February last, but not yet reported.]

The LORD CHANCELLOR was proceeding to deliver his judgment, when

*Bethell* begged to refer his lordship to *Hawthorne's case*, 1 Mac. & G. 49; s. c., 13 Jur. 158.

*Palmer*. That case turned entirely upon the circumstance, that, under the Banking Act, the liability to creditors continued for three years after the transfer.

LORD CHANCELLOR. I will look at that case, and give judgment to-morrow morning.

June 1. LORD CHANCELLOR. This case of the North of England Banking Company, is the case of a joint-stock company, and the question is, whether a person who transferred his shares upwards of three years before the stopping of the company can now be put upon the list of contributories under the Winding-up Acts. In all these concerns, in which, of course, there are a great many floating balances and open accounts, it is scarcely possible, or even if the concern is of a different nature, where there are any speculations, it is scarcely possible, from time to time, at any given moment, to ascertain what the actual loss is; and therefore, generally speaking, when a man comes in as a purchaser of an interest in any of these concerns, he takes it just as he finds it—he takes it with a loss, whatever it may be, and with a benefit whatever that may turn out to be; otherwise you would have occasion, if a man were to be liable who was selling a share with losses up to the time, unless you had some provision to meet that exact case—you would, in every case, have to take an account, which, after the event, would be almost impossible, of what the actual

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extent of loss was at the time that particular individual sold. Now, in this case, there have been between 1,200 and 1,300 transfers. If the contention at the bar, on the part of the appellant, is right, there must be on every one of those transfers an account taken to ascertain what the amount of loss was in this company at each particular transaction. It would be almost impossible to take such an account. I think this is quite clear, that, on a question of this nature, you cannot say the loss was incurred, as was attempted to be argued when the debt was incurred—that is, when the loan or advance was made. It is impossible to say that the loss was then incurred, because that in the result the debt proves a desperate one. Then the question is, what is the exact moment when the loss accrued? This company went on in a way that was sure to lead to ruin, having mere securities upon paper, and when they found that the debtor could not pay, they renewed their bills. Well, these bills were not worth the paper on which the obligation was written, except for a fictitious credit; but that was the course they pursued. It is impossible for any man to say when the particular loss in many of these transactions did accrue, because that loss, as a mere matter of fact, would depend upon this, at what particular period was each debtor insolvent?—and, in short, that would lead to an inquiry that no man living could carry out. That is obviated in most cases by the circumstance, that, having regard to the impossibility of ascertaining any thing about the real state of the concern, a man buys a share in the concern just as it stands, subject to future calls, and then no question arises. If the capital has not been all called up, they may have the benefit, or they may come into the concern at the time that it is absolutely insolvent; for that there is no help. But this deed has a particular provision, that the seller shall be absolved from all future liability, but that he shall be still liable for losses already incurred.

Now, that introduces the question which is now before me. After giving certain directions authorizing transfers, as to which I shall speak presently, the deed provides, in a subsequent clause, (clause 26, which has been so much observed upon), that whenever any share is transferred, the man who makes the transfer shall be “released from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants,” and so on, in the deed of settlement. If it had stopped there, those future liabilities would have extended to all prior obligations then existing and ascertained; because, if there were bills running, and the men were insolvent, there would have been engagements actually entered into. But then come these words:—“Provided nevertheless, that nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares, so forfeited or transferred as aforesaid, from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder as aforesaid.” Now, if the ascertainment of these losses is provided for by the deed of settlement, then that clause may be a sensible clause, because in that case the party buying would know the state of the concern, the party selling would know what he was still liable

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to, and the company would have, what is contended is the true construction, the continuing liability of the outgoing partner in respect of the losses referred to in this proviso; and it is contended on both sides, upon which I give no opinion, that the purchaser is liable to the whole extent of the liability of any partner, that is, as well to future as to past transactions, and that this clause only deems the transferor, that is, the seller of the shares, liable to past losses as a surety for the purchaser of the shares.

Now, I have been very much pressed in argument as to what the meaning of this expression is — “the losses, if any, sustained by the company up to the period of his ceasing to be such holder.” It is argued very strongly and very well, that this cannot apply to any thing except what is a loss beyond the whole capital, and that whilst any portion of the capital remained uncalled up, there could be no loss within the meaning of this proviso, for that the loss which has ensued at any given moment before the capital is called up affects the purchaser, and no doubt everybody knows it affects the market value of the property. The state of the concern may not be known accurately. The shares fluctuate; and why? Because the concern is considered either to be going down or going up, and therefore the shares fluctuate accordingly. I do not think that I am called upon to decide that question here; it is a difficult question; but the question which I think calls for decision is, whether there was any ascertained loss within this clause for which Mr. Holme was still liable. Now, that, I think, depends upon the true construction of this deed. I may first observe, that I stopped in the judgment I was about to deliver yesterday at the conclusion of the argument, because another case was quoted. It is never too late, of course, to quote a case for the guidance of the court, although it is inconvenient after the whole of the argument is closed; but that case I find has no bearing upon this. That case turned entirely upon the party going out being still liable to creditors under the general acts. Three years had not elapsed; he was, therefore, clearly liable in respect of past losses to creditors, and consequently he was properly placed as a contributory on the list under the Winding-up Act—not deciding to what extent he was liable, or for what he was liable, but that he was a contributory, and was liable as such. I think that case was rightly decided, but I do not think it has any bearing upon this.

This deed provides, first, in clause 69, that the directors shall keep proper books of account, and that they shall enter into those books “fair, explicit, and true entries of all receipts, payments, transactions, and dealings by, or on behalf of the company, and of all profits, gains, and losses arising therefrom; and also an account of all dealings,” and so on; “and shall make or cause to be made out a full, true, and explicit statement and balance-sheet exhibiting the debts and credits of the company, and the amount and nature of the capital and property thereof, and the then fair value of the same, estimated by the directors as nearly as may be, and to the best of their judgment; and the amount of the company’s negotiable securities then in circulation, and the profits and losses of the company, and all other matters and things

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requisite for fully, truly, and explicitly manifesting the state of the affairs of the company." Now, this clause admits of no doubt; there is no necessity to strain the words; give to them their natural interpretation, and nothing can be better framed, and nothing can be more plain — they are to keep a true account of their transactions, both of gains and losses, arising from carrying on the concern, and they are to exhibit the actual value of the property, and they are to estimate the profits and losses. If the directors had done their duty in this respect, no question could have arisen, because that under clause 26 the liabilities continue for past losses to the person transferring is beyond all question. But the deed also says the loss shall be shown upon the face of the accounts; and if the directors had done their duty, which they entirely neglected, it would then have appeared what the actual losses were, and no difficulty would have arisen.

Now, in a previous clause, (clause 45), which embodies the clause which I have just read, there is a further direction — "At every half-yearly general meeting of the company the directors shall exhibit to the shareholders assembled such a balance-sheet as they are required to prepare by the 69th clause." That embodies, therefore, the clause to which I have already referred. There is no doubt that this is cumulative. Besides giving such a balance-sheet as is directed by the 69th clause, they are directed to do this — "and such a statement of the probable amount of the losses to be apprehended from the subsisting accounts or engagements of or with the company, and generally of the state and progress of the affairs of the company up to the 30th June and the 31st December immediately preceding such meeting, as the directors shall deem expedient for the interests of the company to be made public." Therefore, there is an additional duty here thrown on them, and it is a duty which is discretionary. The 69th clause is embodied in it; therefore it is imperative; they must make out an account showing the actual loss, and that account must contain a true statement of the value of the concern. By this clause, which, although it comes before the other, refers to the later one, which is embodied in it, they are to have such a statement of the probable losses, and of the state of the concern, as they may deem necessary and proper to be publicly known. Well, that was really a precaution. You are not only to state the thing as it actually exists, but you are to state what the probable effect of pending transactions may be on the concern. You are to have such a discretion as will not throw on the public unnecessarily a statement of probabilities which may never come to pass. Then come these words, which I believe were not read on either side — "And every such balance-sheet shall be binding and conclusive on all the shareholders, their executors, administrators, and assignees, unless some error shall be discovered therein respectively before the next half-yearly general meeting, and in that case such error only shall be rectified." By this clause, therefore, I consider the balance-sheet, as rendered by the directors, on whom the duties devolved, was actually binding on all the partners in this concern, unless errors were produced.

Now, the partners entering into this concern certainly chose to have



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as little power over it as it was possible for men to have, and they have chosen implicitly to trust to their directors; for by the 16th clause it is expressly provided, that "no shareholder, not being a director or an auditor, his executor," and so on—the largest words to include every one claiming under him—"shall be entitled or allowed, under any pretence whatever, to inspect or have in equity a discovery of all or any of the books, accounts, documents, or writings of the company, except such as may be produced for his inspection at any meeting of the company, and except the deed of settlement." So that, except what was produced at the general meeting, no shareholder had, by the express terms of the common deed of partnership, the power to call for or inspect the documents. The body of shareholders, therefore, must take the accounts just as they find them. Now, it is said, that, in point of fact, Mr. Holme knew, and that the shareholders generally knew, that these accounts, which I should call fraudulent accounts—fraudulent in the sense of being made up contrary to the truth and the fact—were made to represent profits with the capital continuing, when, in point of fact, the profits were none; the losses heavily outweighed them by several hundred thousand pounds; and the accounts were, in the view I have of such matters, what I should term fraudulent accounts; and it is said the partners were aware of it. I think that tells against the party who makes use of that argument, because if all the partners were aware that these were not true accounts; but chose to go on deceiving themselves and the public, they cannot afterwards say that those accounts are not to be binding between themselves in transactions which have been founded on those accounts, because it is sworn, and not denied, that, during the whole time this company was carried on, in no one instance has any transferor of shares been called upon to contribute for past losses, although those losses had been to an enormous amount; nor upon the occasion of any one transfer—and no transfer took place without the consent of the directors—was an account taken to ascertain what the actual losses were; therefore all the partners chose to deal with the accounts as they were furnished, and dealing with these accounts, they were necessarily bound by them as between themselves.

There are some clauses of great particularity in this deed, and particularly clause 15, which makes, as I understand it, the share of a shareholder liable to any debt which he owes to the partnership, which, of course, means, in dealings between him and the partnership; but there is an express proviso, "that such charge or lien upon the shares of a shareholder shall be wholly discharged upon the transfer thereof by him with the consent in that behalf prescribed in the 22d clause in this deed." So that, after he transferred, that liability was given up by the company in favor of the purchaser.

Now, it is material to consider how the transfers were to be carried into effect. In the first place, the company guarded, as they generally do, against any shareholder escaping from the company by making a transfer while any calls remain unpaid; and therefore by clause 21 it is provided, "that no shareholder shall be allowed to vote at any meeting of the company, or to exercise any other right

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or privilege, under or by virtue of the deed of settlement, until the amount of every call which shall have been made in respect of his shares, together with interest thereon as aforesaid, shall have been fully paid and satisfied." Then comes clause 22, and that clause is of very great importance, in this respect—it directs, what I do not remember ever to have seen before, "that once in every half year the directors shall set a value upon the shares, and such value shall, for the purposes of these presents, be deemed the true and actual value thereof for the time being." Now, observe, if it stopped there, no man can sell a share until a value has been put upon it by the directors, and that value is declared by the deed to be, for the purpose of the deed, the true and actual value thereof for the time being. How can you, therefore, say, if it fixes a value of 3*l.* on the shares in question, that that was not the actual value for the time being? Now, "actual value" there, must mean actual value with reference to the actual state of the concern. I think we may take it for granted that nobody knew it properly but the directors; they had the means of knowledge—it was their duty to put a value on it. They must have put the value according to what they considered to be the actual state of the concern; for one very good reason, as we shall presently see—they were bound to purchase at that value; and therefore, in the execution of their duty, if properly performed, what they ought to have done would have been fairly to value them, because they were bound to purchase at that value. I take it for granted they did do it, and the value put upon the shares must be with reference to the whole state of the concern at the time the sale was affected.

Then it goes on, that it shall be lawful for the shareholders, with the consent of the directors, to sell; and then comes the clause, that "for the purpose of obtaining such consent, the holder of the shares proposed to be transferred shall give notice" to the directors, and so on, of the proposed purchase. Then there is a proviso, "that before any shares shall be sold, the same shall be first offered to the directors, on behalf of the company, at the lowest price the holder thereof shall agree to take for the same; provided also, in case the directors shall refuse their consent to any transfer of shares, they shall, on the request of the holder thereof, be obliged to purchase the same out of the funds, and on behalf of the company, at the value thereof for the time being set upon them as aforesaid." Now, then, the directors are to value, and unless they consent to the sale, they must themselves purchase at the value which they themselves fix. There can be no transfer, therefore, without the consent of the directors, or they themselves become the purchasers at the value. Suppose they had become the purchasers at the value in this case—and that must be supposed in every case, because they would have been forced upon them if they had not consented to the sale—can anybody say that any obligation remained then, in that state of the accounts of the company? The purchase would have been, then, by the directors, the directors representing the company. The directors made out the balance-sheets. Could the purchasers, having set a value on those shares on the 1st January, and bought the shares at that value under the

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compulsory power of this deed, turn round on the seller, and say, "We call upon you now to make good losses, to the amount of 100,000*l.*, which had accrued at that time, but which we never mentioned to you before?" Of course they could not; and if they could not, it is clearly a very easy course of reasoning that an indifferent purchaser could not, because an indifferent purchaser stands only in the place in which the directors would have stood if they had purchased.

Then comes the clause which I said was here, that "no shares shall be transferred after the time appointed for payment of any instalment called for by the directors, until the amount of such instalment in respect of the same shares, with interest as aforesaid, shall have been paid," the object of that being to allow no man to escape until he had paid up all the existing obligations. Then they have the whole power of regulating the transfer of shares; and there are other clauses, to which, I think, I need not call attention. Then the real question upon the whole of this deed is, whether this gentleman is liable upon the accounts which have been made out, and which in no one instance show any loss which has not been provided for, speaking of the early ones as well as the later ones. No one account shows any loss upon the face of the accounts which were made out by the directors, and produced at the general meeting, and acted upon, and approved of, and received by those meetings. Where, then, am I to find any evidence of the loss to which this gentleman is liable, when he sold his shares, under clause 26? I can nowhere find any such loss. There are accounts sworn to, no doubt, by Mr. Hedley. It was Mr. Hedley who kept those accounts. What he says is undoubtedly perfectly true. I do not disbelieve him; but it has no weight—that from time to time he assisted most improperly in preparing these accounts; and at those meetings, no doubt, there were a great body of persons for whom he was bound to act faithfully and honestly. But he now comes forward and tells the court, that from the first moment he knew the growing insolvent state of this company, and always assisted in concealing it; but that act of concealment leads to the impossibility of charging this gentleman, because at this moment there is not a particle of evidence before me to show that there was, at the time when Mr. Holme sold these shares, any actual loss sustained, upon which I can possibly act. Of course, if there was a loss, the deed would undoubtedly bind him to that loss; but I can find no such loss; and I am of opinion, that, under the provisions of the deed, the losses for which it was intended an outgoing shareholder should continue liable were intended to appear on the balance-sheet, so as to lead to no possible difficulty. If the directions of the deed had been observed, there would have been no difficulty. I should then only have had to open the particular account at the time of the transfer. I should have seen what the amount of the loss was, and have bound this gentleman by the amount of that loss. I look into the balance-sheets, and see a preposterous state of affairs on the face of those balance-sheets—no loss, but gains and profits divided. Therefore I am clearly of opinion that this gentleman is not liable in respect

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Vaughan v. Booth.

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of any loss, for none is shown to me; and looking at the dealings, I am of opinion none can be shown; and therefore, without any reservation of any sort or kind, I think he is not a contributory, and I dismiss this appeal, with costs.

*Appeal dismissed, with costs.*

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VAUGHAN v. BOOTH.<sup>1</sup>

March 6, 1852.

*Will—Construction—Legacy—Domestic Servant.*

Sir F. B., by his will, directed his executors to pay to each of his domestic servants who should be with him or in his service at the time of his decease such sum of money as should be equivalent to two years of the then annual amount of their respective wages. A. was the gardener of Sir F. B., at a mansion where Sir F. B. formerly resided, but which for a short time previously to and at the time of the decease of Sir F. B. was let by Sir F. B. to Lady M. for a short time. A., however, had never ceased to be the servant of Sir F. B., but had the charge and management of the gardens at the mansion, for which he received an annual sum from Sir F. B., in addition to his yearly wages. A. was not resident in the mansion, but resided in a cottage in the garden, in the same manner as he did when the mansion was inhabited by Sir F. B.:—

*Held*, following *Ogle v. Morgan*, 16 Jur. 277; s. c. 10 Eng. Rep. 92, that A. was not entitled to a legacy as coming within the description of "a domestic servant of the testator living with him or in his service at the time of his death."

THE bill in this case was filed for the administration of the trusts of the will of the late Sir Felix Booth, who, by his will, amongst other bequests, gave and bequeathed to William Fox, who had been many years his coachman, and whether living in his service or not at the time of his death, an annuity of 40*l.*, to commence and be paid to him at the times and in manner therein mentioned; and he also gave and bequeathed to James Taylor, his gardener at Catworth, and whether living in his service or not at the time of his decease, the sum of 15*s.* a week for and during his life, and to be payable at the times and in manner therein mentioned. And the testator also directed in manner following—that is to say, "I direct my executors to pay, within three calendar months after my decease, to each of my domestic servants who shall be living with me or in my service at the time of my decease, (including the said William Fox, if then living with me), exclusive of any other gift or legacy I may have in this my will provided for any of them, such sum of money as shall be equivalent to two years of the annual amount of their respective wages, exclusive of and in addition to such wages as may be owing to them at my death." And the testator also directed that each of his said domestic servants, and also the said James Taylor, should

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<sup>1</sup> 16 Jur. 808.

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be furnished by his executors, at the expense of his estate, with suitable mourning.

The usual decree having been made for taking the accounts, a claim was carried in by one William Gillies, of Fern Hill, near Windsor, late a gardener in the employ of the testator, claiming to be entitled to participate in the before-mentioned bequest as a domestic servant living with the testator or in his service at the time of his death. By the affidavit of William Gillies, filed in support of his claim, it appeared that he entered into the service of the testator, at Fern Hill aforesaid, in the month of May, 1842, and was engaged by him as under gardener at the weekly wages of 12s., and that he also had the use of two rooms to reside in at a cottage in the garden, and was allowed firing; that he continued in that situation of under gardener till February, 1843, when he was engaged and became the second gardener, and was paid the weekly wages of 15s., occupying the same rooms, and having the firing provided for him as before, and he continued in that situation until the month of November, 1848; that in the month of November, 1848, the head gardener having left in June, he succeeded him in that situation, and the testator agreed to pay him 60*l.* per annum for his wages; that the testator desired him at this time to leave the cottage in the garden and reside in the house, as the family was going to town, and that he continued so to reside in the house until July, 1849; that during the period last referred to, namely, between November, 1848, and July, 1849, the testator paid him from time to time money on account of his wages, and that he did not receive the same, as he had been accustomed to before, by weekly payments; that from November, 1848, to July, 1849, he received money from time to time from the testator to pay the current expenses of the gardening, out of which he appropriated equal to about 15*s.* per week for his maintenance, or as board wages, in the house, and the difference, 10*l.* 17*s.* 9*d.*, due to him between the aggregate amount of such money so appropriated and the 60*l.*, the amount of his annual wages, was paid to him by the executors of the testator after his decease; that in the month of July, 1849, the testator let the house and grounds to Lady Mansfield for twelve months, and the testator told him that Lady Mansfield was to be supplied with the proceeds of the garden for her own establishment, but that the gardens were still to be maintained by him, and that he was to continue in his (the testator's) service, as formerly, and not to be in the service of Lady Mansfield; that it was thereupon agreed between the testator and him, that, in addition to the sum of 60*l.* as his yearly amount of wages, the testator should pay him the sum of 140*l.* for properly keeping up the gardens, making 200*l.* altogether, and he was to provide what additional labor and what seeds and other articles were necessary for the garden; that upon Lady Mansfield taking possession of the house in July, 1849, he removed to the cottage which he had before partly occupied, and wherein he had since continued to reside since the testator's death in the month of January, 1850; that between the 14th July, 1849, and the 5th January, 1850, the testator made him, from time to time, payments on account of the last aforesaid

arrangement, and that he had received between those periods the sum of 100*l.* from the testator on account thereof; that in the month of November, 1849, by desire of the testator, he went down to his farm and property at Catworth, in Huntingdonshire, to superintend the planting and transplanting the shrubs and forest trees in the grounds there, and he remained there for about three weeks; that while he was so staying at Catworth he was informed that Lady Mansfield had inquired the cause of his absence from Fern Hill, and that he mentioned this circumstance to the testator, and that the testator replied to him, "that if Lady Mansfield had what the garden produced, she had nothing further to do with him; that he was his servant, and he paid him as such; and that if Lady Mansfield found any fault with him, he was to refer her to him;" that he never received anything from Lady Mansfield during the time of her continuance at Fern Hill, which she relinquished in July, 1850, and that he was solely and exclusively paid by the testator, as his servant, from the time of his entering his service until his decease. The Master in his report stated, amongst other things, that upon consideration of the claim of William Gillies, he had not thought fit to allow the claim, and submitted the same to the consideration of the court. A petition was now presented by the executors, the plaintiffs in the suit, for the confirmation of the Master's report, and it prayed, amongst other things, that it might be determined whether or no William Gillies was a domestic servant of the testator, living with him or in his service at the time of his decease, and as such entitled to such sum as was equivalent to two years of the then annual amount of his wages.

*Boville*, for William Gillies. In this case there is no dispute as to Gillies being a servant of the testator at the time of his death; therefore he would come within the second clause of the bequest, "in my service at the time of my death." The only question is whether he was a "domestic servant."

[Sir J. ROMILLY, M. R. How do you distinguish this case from *Ogle v. Morgan*, 16 Jur. 277; s. c. 10 Eng. Rep. 92?] There the expression was much narrower than in this case. In that case the bequest was "to each person as a servant in my domestic establishment at the time of my decease." The expression has reference to the house, not the party. In this case the attention of the testator is directed to the party, not to the house — "to each of my domestic servants who shall be living with me or in my service at the time of my decease." In *Ogle v. Morgan* the Lord Chancellor held, that the word "domestic" having been coupled by the testator with the word "establishment," it must have been the intention of the testator to limit the word "establishment," and to confine the bequest to indoor, and to exclude outdoor servants. In this case no such intention can be gathered from the words used. The question, then, simply is, whether a gardener is a domestic servant. The word "domestic" does not necessarily mean one who is resident in the house, but it means one who appertains to the house, and ministers to the comforts

*In re The Madrid and Valencia Railway Co.*

of the house. If the contrary construction were to prevail, all servants who live out of the house, such as coachmen, gate-porters, laundry-maids, dairy-maids, &c., would be excluded from such a bequest as this. This could never be the intention of the testator. The words in this case, "or in my service," being added to the previous words, "who shall be living with me," distinguishes this case from that of *Ogle v. Morgan*.

Sir J. ROMILLY, M. R. I cannot distinguish this case from *Ogle v. Morgan*, that case depends on the use of the word "domestic." The Lord Chancellor in that case decided that a legacy to "a person as a servant in my domestic establishment" would not entitle a party not an indoor servant. I can draw no distinction between the expressions used in that case and in the present. I am, therefore, of opinion, that the Master was right in disallowing the claim.

*In re* THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849, and *in re* THE MADRID AND VALENCIA RAILWAY COMPANY.<sup>1</sup>

February 13, 1852.

*Distribution of Dividend among Scripholders.*

Shares in a company for making a foreign railway, not registered provisionally or otherwise, were allotted, and were treated by many of the allottees as transferable, and were sold by them. Scrip was afterwards issued to the holders of shares, whether they were the original allottees or not. Much of the scrip was afterwards sold and transferred by the holders. In winding up the company all the scrip was accounted for, except the scrip for about five per cent. of the shares allotted. Under certain terms of compromise, approved by the Master, a certain quantity of scrip was delivered up to be cancelled. The Master declared a dividend of 15s. per share on the shares allotted and paid upon, and not cancelled; and on the application of the official manager, it was ordered that he should distribute this and all future dividends among the scripholders for the time being, with the approbation of the Master, on the ground that the transfer of shares was the equitable transfer of a mere right to recover back the deposit on a total failure of the scheme, and notwithstanding that the scripholders were not all contributories.

THE Madrid and Valencia Railway Company was one of the abortive schemes of 1845, for the formation of a railway from Madrid to Valencia. The project was not registered provisionally or otherwise. Shares were allotted, and the deposit of 2l. per share was paid on 53,015 shares, amounting to the sum of 106,030l. In many instances, before the time for payment of the deposit, the letters of allotment were sold and transferred to other persons, so that the deposit was not paid in every case by the original allottees. The scrip certificates, moreover, were issued to the persons presenting the letters of allotment, whether such persons were the original allottees of shares or not, and such scrip did not designate the person to whom the shares were allotted or issued. These certificates were issued to about 960 persons.

<sup>1</sup> 16 Jur. 809.

Many of these scrip certificates were treated by the allottees and holders as legally transferable and were sold and transferred in some instances by mere delivery, without any writing and without any registration of such assumed transfer, or assent by the other shareholders thereto. No register of the shareholders was ever kept, nor did the directors require, nor was it a term of the prospectuses upon which the company was formed, that the transfer of shares should be registered in the books of the company. An order was made to wind up the company, and at the date of that order its assets were very small. In the subsequent proceedings, scrip certificates, representing 25,675 shares, were produced and left with the official manager by 321 persons, of whom 162 produced 9,636 shares, corresponding with the numbers respectively allotted to them, and these persons were named contributories of the first class, which, so far as the list was settled, included allottees of shares who had paid the deposit; the second class in such list professing to consist of allottees who had not paid the deposit. The remaining scrip certificates for 16,039 shares were produced by 159 persons, who were not the original allottees of those shares, except twenty-one of them, who claimed to be so in respect of some of the shares, for which they respectively produced scrip, and these twenty-one persons were placed on the list, in the first class, in respect of those shares, accordingly. The persons to whom the remaining shares were originally allotted, and not the transferees, were placed on the list of contributories in respect of these shares. Pursuant to certain terms of compromise, approved by the Master in an order dated the 7th August, 1851, scrip certificates for 24,870 shares, a further part of the 53,015 shares on which the deposit was paid, were delivered up to the official manager to be cancelled. As to the remaining 2,470 shares, neither scrip certificates nor deposit receipts were produced, nor was any claim made in respect of them, but the allottees thereof were named in the first class of contributories. The Master, by an order in January, 1852, declared that a dividend of 15s. per share, on the shares allotted and paid upon, and not delivered up to be cancelled, ought to be paid to the parties then entitled to receive the same. The official manager applied to the Master to order that this dividend of 15s. might be paid to the present holders of the said last-mentioned shares, the official manager first giving notice to every person to whom shares were originally allotted, and who was not then in possession of the scrip for such shares, that such scrip was held by third parties, and that unless such person should, on or before a day to be limited in such notice, give to the official manager notice in writing to the contrary, the official manager should pay the amount of the dividend on the said shares to the holders thereof; and also on his causing to be inserted in such newspapers, as he might approve, advertisements giving notice of such dividend, and requesting all persons claiming to have any right or title thereto, and not being then the holders of the scrip, or, being such, not having produced the same to the official manager for registration at or before a time in such advertisements to be limited, to furnish the official manager with a full explanation of their claims,



or that they would be excluded from receiving such dividends, and from all future participation in the funds of the company. The Master thought that difficulty might arise with respect to the shares then held by persons to whom the same were not originally allotted, and that he could not properly direct the official manager to pay such dividend to any person except such allottees. The Master therefore made a special report of the above facts, which he directed the official manager to bring before the court, and adjourned the further consideration of the application until the court should have made the order or given other directions.

*Selwyn* now applied for an order in the terms proposed. He said that the shares unaccounted for were less than the general average in these cases, which was about five per cent. of the whole number; that all the parties had had full notice; that, as far as the legal rights were concerned, the company having failed, the allottees of shares had a right to recover back their deposits; that that right was barred at law by the Statute of Limitations, but the company having been wound up, it should be considered to exist in equity. One difficulty was with respect to the Joint-stock Companies Registration Act. It was considered that, under that act, there had been no legal assignment of the scrip in this case. *Bagshaw v. The Eastern Union Railway Company*, 2 Mac. & G. 389.

[Sir J. PARKER, V. C. Had there been a certificate of complete registration in that case?]

I think not; but, however, this is not a company within that act, because this is a foreign company.

[Sir J. PARKER, V. C. The right is a mere debt, assignable in equity; this transfer of shares is a transfer of a right to receive back the deposit on a total failure of the scheme. I should not wish to rest it on the fact of its being a foreign company, for it was a company established in England for some purposes, but upon this fact, that the transfer of shares was the mere transfer of such a right as I have mentioned.]

Another objection arose from the decision in *Carrick's case*, 1 Sim. (N. S.) 505; s. c. 5 Eng. Rep. 114, and from the question, whether, according to that authority, these persons were contributories.

Sir J. PARKER, V. C. This is not a question of contribution; the contributories may fall short of the class of persons who have a right to receive something back, and the only contributories may be the governing body. I think that what is asked may be done, not treating this as a transfer of shares, but as a transfer of the right to receive back the deposits.

The order was, that the official manager might be at liberty, with the sanction of the Master, to distribute the dividend already declared of 15s. per share, and all future dividends, among the persons for the time being, appearing to be upon the list of scrip-holders made out by the official manager, and that the Master might be at liberty, from time to time, to settle such list.

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*In re The Great Western Extension Atmospheric Railway Co., &c.*

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*In re THE GREAT WESTERN EXTENSION ATMOSPHERIC RAILWAY COMPANY; and in re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849.*

February 24 and 25, 1852.

*Statute of Limitations — Debt under Winding-up Acts.*

A claimant against a company, which had been ordered to be wound up, produced evidence to prove the debt before the Master within the time allowed for recovery of the debt by the Statute of Limitations. The matter stood over by adjournment for nine months, and then the claim was disallowed, on account of the non-appearance of the claimant. On application, the Master afterwards reheard, and disallowed the claim for want of evidence, and as being barred by the statute. Shortly afterwards the claimant got the Master again to review his decision, when he again disallowed it as barred by the statute. On motion, it was referred back to the Master to review his decision, on the ground that, the debt not being barred when first claimed before the Master, it was impossible for him to say that it was afterwards barred.

THIS was a motion on behalf of W. C. Wryghte, the official manager of the Tring, Reading, and Basingstoke Railway Company, that the certificate, order, or decision of the Master charged with the winding up of the Great Western Extension Atmospheric Railway Company, dated the 6th February, 1852, whereby he disallowed the claim of the said W. C. Wryghte, as such official manager as aforesaid, against the said Great Western Extension Atmospheric Railway Company, as barred by the Statute of Limitations, might be reversed or varied. On the 29th June, 1849, the Tring, Reading, and Basingstoke Railway Company was ordered to be wound up, and on the 27th July, 1849, the Great Western Extension Atmospheric Railway Company was ordered to be wound up. On the 12th February, 1850, an affidavit in support of a claim for 2,500*l.*, as a debt from the latter to the former company, was carried in by Mr. Wryghte, as the official manager of the Tring Company. In February, 1851, the consideration of all claims was adjourned by the Master until the following November. At a meeting on the 18th December, 1851, Mr. Wryghte made default in appearing to support his claim, and consequently the claim was disallowed. On the 18th January, 1852, application was made to the Master to rehear the claim, and the Master then disallowed the claim for want of evidence, and as barred by the Statute of Limitations. In the minute of proceedings the Master was stated to have said, "I have proceeded to review my decision of the 18th December, 1851, as to the said Mr. Wryghte's claim, and I have adhered to my said decision, and have disallowed the said claim, both for want of evidence, and as being barred by the Statute of Limitations; and the said Mr. Wryghte having applied to me for leave to consult the books of the above-named company, I direct the said official manager to allow him to have access to the said books; and I direct, that if he finds any evidence therein in

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*In re The Great Western Extension Atmospheric Railway Co., &c.*

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support of his claim, he may call my attention thereto at the next meeting which I shall appoint to consider the matters of the above-mentioned company." At a meeting on the 6th February, 1852, the matter was again brought before the Master, and the following is the Master's memorandum of his decision: — "I have proceeded again to review my prior decision upon the claim of the said Mr. W. C. Wryghte, and there has been read before me the evidence relating to the said claim, filed on the file of proceedings in this matter; and I have adhered to my said prior decision, and have again disallowed the said claim, as barred by the Statute of Limitations; and the said official manager has asked, against the said claimant, for the costs of opposing the said claim, which I have thought fit to refuse, as not within my jurisdiction."

*Daniell and Roxburgh*, appeared in support of the motion appealing from the Master's decision.

*Bacon and Selwyn* supported the Master's decision.

The following cases were cited: *Pulteney v. Warren*, 6 Ves. 73; *Thompson v. The Universal Salvage Company*, 3 Exch. 310; and *Cox's case*, Id. 180.

Sir J. PARKER, V. C., said that the question upon the Statute of Limitations, which had been argued, did not properly arise in this case. A creditor of a company might sue the official manager at law or in equity; and as to whether the winding-up order affected the operation of the Statute of Limitations, his honor gave no opinion, as the question did not arise here. After the order to wind up the company had been made, and on the 12th February, 1850, under the 74th section of the Winding-up Act of 1848, an affidavit was brought in to prove the debt. The claim at that time, whether good or bad, was not barred by the statute. Nothing was done upon that until the 18th December, 1851, and then the Master said that he proceeded to consider that claim, among others, and the claimant not having appeared, he disallowed the claim. On the 18th January, 1852, there was an application by the claimant that the Master should review his report, and the Master then said, "I adhere to my former decision, and disallow the claim, both for want of evidence, and as being barred by the Statute of Limitations." The claimant then got it reviewed again, and came before the Master on the 6th February, with further evidence. The Master again said, "I adhere to my prior decision, and again disallow the claim, as barred by the Statute of Limitations." His honor said that it was impossible to suppose, that, where a party had come in with his claim before the time had run, the Master could afterwards say that the claim was barred by the statute. The real question must be, whether the claim was barred at the time when it was brought in. It appeared to his honor that the Master had miscarried in disallowing this claim on the ground that it was barred by the statute. Looking at what the Master had done, it was quite clear that it was on that ground that he had dis-

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allowed it. He had first disallowed the claim because the party did not appear; then, on hearing some evidence, on the ground of want of evidence, and of its being barred by the statute; and then, on further evidence being produced, the Master said, "I adhere to my prior decision, and again disallow the claim, as barred by the Statute of Limitations." That showed very clearly that the Master was not considering the effect of the evidence; he had never applied his judgment to consider the effect of the evidence before him, but proceeded upon the ground that the claim was barred by the statute. Now, the claimant certainly had a right to have the opinion of the Master upon the evidence; and it appeared to his honor that the Master's decision in the present case had proceeded entirely upon the effect of the Statute of Limitations, and that therefore the Master had miscarried; and it must be referred back to the Master to review his decision.

*Costs reserved.*

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SIMPSON v. DENISON.<sup>1</sup>

June 11, 12, 24, and 28, 1852.

*Agreements between Railway Companies—Purposes to which the Funds of a Company may be applied—Tolls.*

By an agreement between the G. N. Railway Company and the A. Railway Company, the G. N. company were, first, to bear harmless the A. company against all their guaranties to canals, or otherwise; secondly, the G. N. company were, until an act of parliament could be obtained, to work the traffic of the A. company, and to pay them such tolls as should, after answering the expenses and liabilities of the A. company, pay a dividend of 4l. per cent. on the paid-up capital of the A. company, and after obtaining the act of parliament the G. N. company were to guarantee 4l. per cent. to the A. shareholders; and, thirdly, the G. N. company were, in the next session of parliament, to apply, at their own costs, for an act of parliament to ratify this agreement, and to keep on renewing such application if unsuccessful, always at their own expense. The Railways Clauses Consolidation Act, 1845, was embodied in the acts of the G. N. and A. companies. On a bill by two shareholders of the G. N. company to restrain their directors from carrying out this agreement, or from defraying out of the funds of the company the costs of such applications:—

*Held*, that the arrangement was not within the purview of the Railways Clauses Consolidation Act, 1845, s. 87, and that payments mentioned in the agreement were not "tolls" within the meaning of that section.

*Quære*, what is a toll, and how ought tolls to be reserved within that section?

*Semble*, a toll is a payment for the right of passing along a highway, public or private; it is a payment connected with the passing over, and should probably be reserved, with reference to the number of carriages passing over the line.

THE bill in this case was filed by the plaintiffs on behalf of themselves and all other shareholders of the Great Northern Railway Company, and sought to restrain the company and the directors from working the traffic of the Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company, and from applying any of the

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funds of the Great Northern Company in answering the liabilities of the former, or furnishing the latter company with funds for paying a dividend of 4*l.* per cent. on their shares, or paying to the same company any moneys under an agreement of the 5th May last, or applying any moneys to defray the expense of proceedings for obtaining an act of parliament ratifying such agreement. The case made by the plaintiffs in support of this bill was, that by the agreement in question, signed by sundry of the directors of both companies, the Great Northern Company agreed to bear harmless the Ambergate Company against all liabilities, whether of canals or otherwise; and that, until they could procure a special act of parliament enabling them to work the Ambergate traffic on their own account, they would, from the 1st July next, work such traffic under the agreement, and pay the Ambergate Company such tolls as would, after answering all expenses and liabilities, furnish a dividend of 4*l.* per cent. upon the paid-up capital of the Ambergate Company, and as soon as an act should be obtained, the Great Northern Company was to guarantee a dividend of 4*l.* per cent. on such capital. It was part of the agreement that the Great Northern Railway Company should apply, at their own expense, for an act of parliament to ratify the agreement, and if they should not obtain the act in the first session after the date of the agreement, then to renew the application at their own expense, unless the application to parliament should fail by the default of the Ambergate Company. The Great Northern Railway Company was also to have the privilege of paying off the Ambergate shareholders at par, at any time after obtaining the act, on giving six months' notice, those shareholders being relieved from any further call. A special general meeting of the Ambergate Railway Company had confirmed this agreement. The plaintiff Simpson was, before and at the date of the agreement, the duly registered proprietor of twenty shares, equal to 500*l.* stock; and the plaintiff Wright, was the duly registered proprietor of fifty half shares, of the value of 625*l.* stock. The defendants were the directors of the Great Northern Railway Company, the chairman, E. B. Denison, M. P., being the first named. The Ambergate Railway Company Act was passed in 1846. The company had entered into certain guaranties to the Nottingham and Grantham Canal Companies. Their line was open for traffic on the 13th August, 1850. The same company had also contracted with the town of Nottingham to purchase twenty-three acres of land, for a station, for 9,000*l.*

*W. P. Wood and Jessel*, for the injunction. This is a usual arrangement, such as is now not infrequently entered into between two railway companies, the one of which is to work and take the receipts on the other guaranteeing a certain dividend, which is merely the form of calculating the rent to be paid. An arrangement of this description cannot be carried out except under the authority of an act of parliament; and the present agreement is merely a device to attempt to escape from the necessity of going to parliament. *The Great Western Railway Company v. Rushout*, 16 Jur. 238; s. c. 10 Eng.

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Rep. 72. If this is not an agreement for the Great Northern Railway Company to become carriers on the Ambergate line, what is it? But that would be clearly unlawful. They have no right to carry a single passenger or a single bale of goods, except under their own act of parliament and on their own territory. Then they are by this agreement to apply the funds of the company in an unlawful manner. What is a toll? It must mean some payment intimately connected with the traffic. (See sects. 97 and 98 of the Railways Clauses Consolidation Act, 1845.) There is no certainty that the tolls here agreed to be levied are not greater than the special act authorizes to be taken. If the act of parliament referred to, as to be obtained for sanctioning this agreement, should be refused, with ever so much emphasis, by the legislature, still, unless the Ambergate Company had been the cause of the refusal, this agreement was to remain in force. If this proviso were permitted, the decision would, in effect, give to an agreement, which might be exactly contrary to the wish of the legislature, exactly the same force as if it were in accordance with that wish. Lastly, the agreement provides, that the costs of all applications to parliament for ratifying and carrying out the agreement are to be defrayed by the Great Northern Railway Company. This is clearly opposed to the cases of *The Attorney-General v. The Corporation of Norwich*, 16 Sim. 225; s. c. 12 Jur. 424, and *The Attorney-General v. The Guardians of the Poor of Southampton*, 17 Sim. 7; s. c. 13 Jur. 669. See also the case of the Birkenhead Company, before Lord Langdale, *Hodgson v. Powis*, 15 Jur. 1022; s. c. 8 Eng. Rep. 257.

*Bethell, Rolt, and Denison*, for the defendants, the directors of the Great Northern Railway Company, opposed the injunction. The Great Northern Railway Company simply expressed in their agreement their intention to do that for which they could obtain the authority of parliament. The court will not set aside altogether an agreement because it contains some branches that were *ultra vires*. The present is merely an executory agreement, for which it was intended to obtain parliamentary sanction. As the Great Northern Railway Company intended to work a portion of the Ambergate line, there could be no illegality in agreeing to pay a toll equal to the amount of 4l. per cent. dividend on the capital of the Ambergate Company without undertaking any of their liabilities. The Great Northern Railway Company did not intend to run simply from Grantham to Nottingham, but to run through from London to Peterborough and Nottingham, and while so running to stop at all the intermediate stations. This was what they meant by working the line. There was no intention to exceed the powers which parliament had granted, or might confer. The Great Northern Company intended to apply for power to take the whole of the traffic of the Ambergate Company. If the court thinks the agreement in part *ultra vires*, it will modify the agreement by striking out only such parts as were objectionable, and leaving the rest untouched. The plaintiffs, as shareholders of the Great Northern Company, have no right to complain of an agreement framed

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with such objects, so obviously beneficial for the Interests of the company. It was then said that the agreement was illegal, because it proposed a delegation to the Great Northern Company of the powers given to the Ambergate Company. The answer to this was, that until an act was obtained the former would continue themselves to exercise all their powers. The case was entirely new, and unaffected by the decisions in *Beaman v. Rufford*, 1 Sim. (N. s.) 550; s. c. 6 Eng. Rep. 106; and *The East Anglian Railway Company's case*, 16 Jur. 249; s. c. 7 Eng. Rep. 505. As to the meaning of the word "toll," it was to be gathered from the 87th and 92d sections of the Railways Clauses Consolidation Act, which provide that it shall be lawful for a company from time to time to enter into a contract with any other company, whether owners or lessees, or in possession, for the passage over or along their line of any carriage or engine, on payment of toll. These words clearly include the traffic connected with the carriage or engine, and support the legality of the present agreement, against which there is nothing restrictive either in the Great Northern Act or in the Ambergate and Boston Act. The amount of the guaranteed dividend at 4l. per cent. would not exceed the maximum amount of toll payable for the use of the line. Under these circumstances the court will, at any rate, not grant the injunction in the general terms of the prayer, but only so far as it is possible the court may consider the agreement not strictly within the powers of the contracting parties.

*J. Bailey, Erskine, and Hedge*, for the Ambergate, Nottingham and Boston, and Eastern Junction Railway Company, were willing to abide by the agreement, which, it was believed, would be beneficial for both companies. If there were to be any modification of its terms it might be necessary to call a general meeting. [They quoted *The Shrewsbury and Birmingham Railway Company v. The London and Northwestern Railway Company*, 14 Jur. 285, and *Ware v. The Grand Junction Waterworks Company*, 2 Russ. & M. 470.] This agreement is, in fact, carrying out the intention and scope of the Great Northern Railway Company. This Ambergate line ought properly to have been one of their branches. This case is, therefore, not within the case of *Colman v. The Eastern Counties Railway Company*, 11 Jur. 74, and the cases of *The Attorney-General v. The Corporation of Norwich*, *ubi sup.*; and *The Attorney-General v. The Guardians of the Poor of Southampton*, *ubi sup.*; for in all these cases the funds were attempted to be applied to an object entirely different from the object originally proposed. [*The Great Western Railway Company v. The Birmingham and Oxford Railway Company*, 2 Ph. 605; 12 Jur. 23, 106; *The Mayor and Corporation of Lynn v. Pemberton*, 1 Swanst. 250; *Cohen v. Wilkinson*, 13 Jur. 641; *Stevens v. The South Devon Railway Company*, 13 Beav. 48; s. c. 2 Eng. Rep. 138, and *Mount v. The Shrewsbury Railway Company*, 13 Beav. 1; s. c. 3 Eng. Rep. 145, were also cited.]

*W. P. Wood*, in reply. The injunction is specially directed against

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any illegal proceeding under the agreement, and not against carrying it out generally. The first part is directed against working the Ambergate line; the second and third parts are against employing funds belonging to the Great Northern Railway Company for that object; and the fourth part is against applying any of the funds of the Great Northern Company towards an application to parliament for an act for ratifying the agreement. The agreement, if legal, would enable the Ambergate Company to delegate the powers given to them by parliament to the Great Northern Company. This is contrary to public policy, and would not be permitted. To call the payment a toll is merely idle. The reality is, that funds destined for one object are, under this agreement, to be applied to an object of a different nature, not contemplated, not sanctioned by parliament. It is paying the debts of one company out of the moneys of another, without any authority so to do. Parties belonging to a company for carrying a line of railway from London to York would, if this agreement be sustained, have their funds applied towards the payment of interest upon debts to two canals, whose rights had been bought by the Ambergate Company.

June 28. Sir G. TURNER, V. C., after stating the circumstances, and reading the agreement. The injunction prayed by the bill extends to three heads: first, to restrain the defendants, the directors of the Great Northern Railway Company, from applying any of the funds of the Great Northern Railway Company in payment of any of the liabilities of the Ambergate Railway Company, either in respect to their contracts with canals, or otherwise in indemnifying the Ambergate Company against any of their contracts; secondly, to restrain the directors of the Great Northern Company from making any payments to the Ambergate Company, so as to make up a dividend of 4l. per cent. on their paid-up capital, or any other sums of money; and, thirdly, from applying any portion of the funds of the Great Northern Company in making application to parliament for an act to ratify the arrangement complained of, either with or without modifications, and also from pledging the credit of the Great Northern Company for carrying out any of the steps in the arrangement.

The first question to be considered upon this motion is, what is the general principle which ought to be applied to cases of this nature. I take that point to be well settled. The principles which are to govern cases of this description between large companies are the principles which regulate the rights of parties in ordinary partnerships. It must be considered, therefore, how this case would have stood if this had been an ordinary limited partnership. Here these companies have been formed for special purposes — that is, for the purpose of making railways between particular places, with power to carry passengers and goods between those places. In the case of an ordinary partnership formed for this purpose, I take it to be quite clear that no majority of the partners could by any means bind the minority to make a railway, or to carry upon a railway between other and different places. Suppose a contract between a limited number of persons



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to trade between particular places — say between London and Oporto — in a particular branch of trade. I think it is quite clear that it would not be competent to any majority of partners to bind the minority to trade between London and Lisbon, although embarking in the same kind of trade, and in the same geographical direction.

The case might be put, which had been referred to in argument, of horsing coaches. Suppose a number of persons agreed to horse a coach to run between London and Bath, it is quite clear that a majority of those persons could not bind the minority to horse it between Bath and Exeter. Then, I think, if the case rested there, I should feel little or no doubt on the subject; but it is the duty of the court, in applying these principles, to consider all the terms of this particular partnership. The general act, (the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 87,) provides, "that it shall be lawful for the company from time to time to enter into any contract with any other company, being the owners or lessees, or in possession, of any other railway, for the passage over or along the railway, by the special act authorized to be made, of any engines, coaches, wagons, or other carriages of any other company, or which shall pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, wagons, or other carriages of the company, or which shall pass over their line of railway, upon the payment of such tolls, and under such conditions and restrictions, as may be mutually agreed upon; and for the purposes aforesaid, it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways." This being a general enactment applicable to all railway companies, I consider that any one who becomes a shareholder in a railway company must be considered as contracting to hold those shares subject to the provisions of that act.

It was argued for the plaintiffs, that the general effect of that clause is merely to give a right to contract for passing over the line of another, but that it did not give any right to a company to take up or set down passengers and goods on the line which was so to be passed over. This was a narrow construction; the object plainly was to enable the trains of one company to pass to the limits of the railway of another company, so as to avoid the necessity of changing the trains at the point of terminus of each of the railways. Suppose one railway stopped at Grantham, and another proceeded from Grantham to York, it is the precise object of this clause to enable the trains of the company which stop at Grantham to go on from Grantham to York on the second company's line. There must, therefore, also be held to have been in the contemplation of the legislature a right to stop at stations as well as to pass them; and if these words import a right to stop, it is very difficult to say they are to have no right to take up passengers and goods. "Passing over," in sect. 87, must mean passing over with the ordinary incidents of passing over, *i. e.* with the right of stopping to take up passengers and goods. The clause, therefore, in my opinion, gives a right to agree for leave to pass over another line with the ordinary incidents; but this is not saying that

the clause gives a right, under color of passing over, to acquire the whole trade of the company over whose line such passage takes place. The question therefore is, whether this is a *bond fide* agreement for "passing over" the Ambergate line on terms within the meaning of the general act, 8 & 9 Vict. c. 20, or whether it has been entered into for other purposes, *i. e.* for the purpose of acquiring the trade of the Ambergate Company; and there is no doubt in my mind, on the agreement itself, but that it was entered into with this latter and more general view.

The defendants, feeling some difficulty in their case on the agreement alone, had filed an affidavit, stating the mode in which the agreement was intended to be carried out, namely, that until a special act should be obtained, ratifying the agreement, they intended to work the trains of the Ambergate Company over the rails of the Ambergate Company, in conformity with the rules now in force with the Ambergate line; and that they would work the traffic of the Great Northern Company by the same trains, leaving the Ambergate Company in the sole control of their line. Now, this statement might, perhaps, have had some effect in varying the case, so far, at least, as materially to qualify the injunction, if the agreement were in other respects within the powers of the act. But, in my opinion, it is not in other respects within the act. The payment here agreed to be paid is not a toll within the meaning of the act of parliament. Tolls are defined to be "dues receivable for the liberty of passing over highways, public or private." They are payments connected with the passing over. It is difficult to know what was the meaning of the word "tolls," as used in the 87th section of the act. It is not necessary to decide what are "tolls," as the word is used in the act; it is sufficient for my decision in the present case that these payments are not "tolls" within the act. If I were compelled to give any opinion, it would be that tolls should be fixed with reference to the number of carriages passing over this railway, the payment being in consideration of their passing over, both under the act of parliament, and from the nature of tolls, being a payment made in reference to their passing over. I do not wish, however, to prejudice the question whenever it may arise. I do not think it arises here. These payments are, in my opinion, not tolls; and the agreement is one, therefore, which the defendants had no power to make. I must, therefore, grant the injunction as to the first and second branches, qualified, however, as to the first branch in the following manner:—[The qualification was not of general interest.]

As to the third branch of the injunction to restrain the defendants from applying the funds of the Great Northern Company in payment of the expense of any applications to parliament, as mentioned, the case of *Ware v. The Grand Junction Waterworks Company* (*ubi sup.*) makes no distinction between applying to parliament for the purpose of altering the scheme and objects of the company, and defraying the costs of such applications out of the funds of the company. But later cases have established the distinction, and it is clearly a distinction well founded in reason and sense. The injunc-

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Cramer v. Cramer.

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tion must therefore be granted as to this branch also of the application; but it must be also limited in some degree; it must be confined to the proceedings on the agreement now before me. That will leave untouched the injunction restraining the defendants from pledging the credit of the company.

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CRAMER v. CRAMER.<sup>1</sup>

February 18 and 20, 1852.

*Trustee Act, 1850, Sect. 22 — Infant sole Trustee of Stock out of the Jurisdiction.*

An infant trustee of stock in the jurisdiction not being within the above-named statute, an infant sole trustee of stock out of the jurisdiction, is not a sole trustee of stock out of the jurisdiction within the meaning of the 22d section.

MRS. HARRIET SARAH CRAMER, widow, since deceased, on the 25th March, 1841, being then resident in Switzerland, invested a sum of 1,800*l.* in consols, in the names of herself, her granddaughter Victoria Harriet Cramer, and her son, the late Dean of Carlisle. Mrs. Cramer and the Dean of Carlisle both since died. A suit was instituted in the Court of Chancery, and it was declared by the court in that suit that Victoria Harriet Cramer was absolutely entitled to one-half of the fund, and that she was a trustee of the other half for the executrix of the Dean of Carlisle. Victoria Harriet Cramer, being a minor, and out of the jurisdiction, an application was now made for an order vesting the right to transfer the stock in another person, under the 22d section of the Trustee Act of 1850, which provides, that "when any sole trustee of any stock, or chose in action, shall be out of the jurisdiction, or cannot be found, or it shall be uncertain whether he is living or dead, it shall be lawful for the court to make an order vesting the right to transfer."

*Headlam* and *Hetherington* appeared in support of the application. They stated that neither this statute, nor the previous act, 1 Will. 4, c. 60, included the case of an infant sole trustee of stock within the jurisdiction, because it very rarely happened that stock was standing in the name of an infant trustee. (Supplement to Daniell's Chancery Practice, 50, note *n*. The question was, whether an infant sole trustee of stock in the jurisdiction, not being within the statute of 1850, her being out of the jurisdiction, would bring her within the general provision of the 22d clause, that "when any sole trustee of any stock, or chose in action, shall be out of the jurisdiction," it shall be lawful for the court to make an order vesting the right to transfer such stock, or to receive the dividends, &c., in any person or persons the court may appoint.

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<sup>1</sup> 16 Jur. 831.

*In re Major Angelo.*

Feb. 20. Sir J. PARKER, V. C., said that the point was, whether an infant, who had been declared by the court to be a sole trustee of a sum of stock, and who was out of the jurisdiction, could be dealt with as a sole trustee out of the jurisdiction, under the 22d section of the Trustee Act of 1850. His honor said that the act applied to two totally different classes or conditions of trustees; one of which was, trustees unable to act on account of their incapacity or lunacy; the other, trustees who were out of the jurisdiction, or could not be found, or where they refused to act; and his honor thought that these provisions were quite separate. The case of an infant trustee out of the jurisdiction would be the same as that of a lunatic trustee in the same position, but a lunatic trustee would not be under the jurisdiction of the Court of Chancery, but under that of the Lord Chancellor in lunacy. Now, supposing that a sole trustee, being a lunatic, were out of the jurisdiction, that could not enable the Court of Chancery to deal with his estate. It would be impossible to say that he was less a lunatic by reason of his being out of the jurisdiction, and therefore construe the act as enabling this court to deal with him; that would be to transfer, by implication, the jurisdiction of the Lord Chancellor in lunacy to this court. So in this case, the act did not apply to an infant sole trustee of stock who was within the jurisdiction, and it could not be extended by implication to the case of an infant sole trustee of stock who was out of the jurisdiction of the court. His honor added, that it might occasion great mischief if the provisions of so beneficial a public act were unduly extended.

*In re THE TRUSTEE ACT, 1850; and in re MAJOR ANGELO.*<sup>1</sup>

February 21 and 25, 1852.

*Constructive Trust—Vesting Order.*

A, the owner of shares in a certain bank, wrote a letter from Calcutta to the manager in England, requesting him to deliver over the shares to the manager of another bank, to which A was indebted, and to pay all dividends on the shares to, and to sell them at the order of, this last-mentioned bank. A being still in India, the shares were sold under the authority of this letter, and the purchaser applied for an order under the above act to vest the shares and dividends in B, for the purpose of enabling the purchaser to obtain a transfer of the said shares and dividends from B, under the authority of the act. On proof of the signature of A to the letter, of the sale, and that the debt had ever since existed and was still due, the order was made.

THIS was a petition under the above act for an order to transfer 132 shares in the Oriental Bank, and that the right to receive the dividends and income thereof might be vested in Charles M'Naughten, and that he might be directed to transfer the said 132 shares,

*In re Major Angelo.*

then standing in the name of Major Angelo, to the petitioner, and to pay to the petitioner the dividends and income thereof.

*Malins and Erskine*, for the purchaser of the shares.

*Headlam*, for the Northwestern Bank of India.

*Tripp*, for the Oriental Bank.

Feb. 25. Sir J. PARKER, V. C., said that this was a case under the Trustee Act, 1850. The petition was presented under these circumstances:—Major Angelo was in the possession of several shares in the Oriental Bank, and being indebted to the Northwestern Bank of India, he wrote a letter to the manager of the Oriental Bank in these words:—

“To the Manager of the London Branch Oriental Bank, London.

“Calcutta, Oct. 15, 1850.

“Dear Sir,—Be good enough to deliver over to the agent of the Northwestern Bank of India, in London, Robert James Roy Campbell, Esq., the 132 Oriental Bank shares standing in my name, and pay to him or his order all dividends accruing thereon; and be good enough to attend to the instructions of that bank with reference to a sale or transfer thereof, and consider this as a full authority.

“Yours faithfully,  
(Signed) “FREDERICK ANGELO.”

That letter was acted on, communications were made to the Northwestern Bank of India, the shares were considered as transferred or pledged to the Northwestern Bank of India, and the dividends were paid to them. The letter contained an authority to sell the shares. It appeared that, in pursuance of that authority, a sale had taken place. Major Angelo was still abroad, and under these circumstances this petition had been presented for the purpose of obtaining a vesting order to complete the transfer of the shares to the purchaser, and the question was whether this was a case within the Trustee Act of 1850. His honor said that there was no doubt that this was a case of constructive trust. Looking at the act of 1850 and the former act, there was a material distinction between them as to constructive trusts. The 18th section of the stat. 1 Will. 4, c. 60, provided “that the several provisions hereinbefore contained shall extend to every other case of a constructive trust, or trust arising or resulting by implication of law; but in every such case, where the alleged trustee has or claims a beneficial interest adversely to the party seeking a conveyance or transfer, no order shall be made for the execution of a conveyance or transfer by such alleged trustee until after it has been declared by the Court of Chancery, in a suit regularly instituted in such court, that such person is a trustee for the person so seeking a conveyance or transfer; but this act shall not extend to cases upon

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*In re Major Angelo.*

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partition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case hereinbefore expressly provided for." Under the former act, therefore, nothing could be done without having a decree declaring Major Angelo a trustee. In the present act the interpretation clause was, that the words "trust" and "trustee" should extend to and include implied and constructive trusts, and where a trustee has some beneficial estate or interest in the subject. His honor said that there was no such clause in this act as in the stat. 1 Will. 4, c. 60, making it imperative on the court in such cases not to act until the right had been declared by decree. By sect. 53 of the act of 1850 it was enacted, that "upon any petition under this act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose." It was clear, therefore, that the intention of the legislature was, that the Trustee Act of 1850 should have a different operation on constructive trusts from what the former act had; it was obvious that the legislature intended that there were certain constructive trusts which might be acted on by the court in some cases, without the necessity of first obtaining a decree. That was in the discretion of the court. The question was, what were the circumstances — what was the nature of the facts under which, a constructive trust being sought to be established, the court might safely act without having it declared by decree? It appeared to his honor that the only facts in this case necessary to make Major Angelo a trustee would be, first, the signature of that letter, on which there was no doubt; next, the sale; and that evidence, his honor thought, might be considered capable of being well established in Major Angelo's absence. There could be no doubt that the letter was from Major Angelo, and that there had been a valid sale. The only other necessary evidence was, that the security had been a continuing security up to the present time; and that Major Angelo, from the date of this letter, had been continuously indebted, and was still indebted, to the bank. That fact was not verified by affidavit. Subject to that, his honor thought — being fully aware of the importance of not extending this act to constructive trusts where there was any doubt — his honor thought that the facts were such as to enable the court to come to the conclusion, that Major Angelo was a trustee, in his absence; subject to the production of an affidavit that he had been continuously indebted, and was so still, he thought that the order might be made. The three facts that made Major Angelo a trustee within the act were, his letter, the sale, and his having been continuously indebted to the bank.

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 Pearce v. Watkins.
 

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PEARCE v. WATKINS.<sup>1</sup>

February 26, 1852.

*Objection for Misjoinder at the Hearing overruled.*

The original mortgagee in fee of a certain real estate died intestate, and his heiress and administratrix devised all estates vested in her by way of mortgage to two trustees, and appointed them executors. By a codicil she appointed P. to be a trustee and executor jointly with the two others. These two renounced and disclaimed, and P. alone proved, and he and his wife, who was the heiress of the testatrix and of the original mortgagee, filed a bill to foreclose as co-plaintiffs. An objection taken at the hearing for misjoinder of Mrs. P. was overruled, though she had no interest, as she was not an improper party to join in a conveyance, to make assurance doubly sure.

THIS was a bill by William Pearce and Mary Church, his wife, against Watkins, for foreclosure of a mortgaged estate. The mortgage was made originally to Samuel Church, in fee; he died intestate, and his daughter, Elizabeth Morris, was his heiress and administratrix. By her will Elizabeth Morris devised all estates vested in her by way of mortgage to Griffith and Bold, upon certain trusts, and appointed them executors. By a codicil, she appointed the plaintiff, William Pearce, "to be a trustee and executor of her will jointly" with Griffith and Bold. Elizabeth Morris died, leaving the plaintiff, Mary Church Pearce, her daughter and heiress at law. Griffith and Bold disclaimed and renounced the trusts and executorship, and William Pearce alone proved her will and codicil.

*Temple and Shapter*, for the defendant, Watkins, raised an objection on account of an alleged misjoinder of Mary Church Pearce as a co-plaintiff. They contended that under the words in the codicil, "to be a trustee," the legal fee in the mortgaged estate had passed to William Pearce, and that Mary Church Pearce took nothing by descent as heiress at law to her mother, and having no interest, she was improperly made a plaintiff. *Trent v. Hemming*, 1 B. & P. N. R. 116; 2 Jarm. Wills, 212; and that therefore the bill must be dismissed, with costs. *Fulham v. M'Carthy*, 1 H. L. C. 703; *Padwick v. Platt*, 11 Beav. 503; *Furze v. Sharwood*, 5 My. & C. 96; *Lowey v. Fulton*, 9 Sim. 104; *Bailey v. Dennett*, 3 Y. & C. 45.

*Elmsley and Prior*, for the plaintiffs.

*Shebbeare*, for another party.

Sir J. PARKER, V. C., said that he thought the objection must fail. It was the rule of the court that a plaintiff could not join with himself another person who had no interest, and that was a very strict rule. His honor said that misjoinder—that is, a joinder of parties

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Ladbroke v. Bleadon.

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who had distinct interests — was a good ground of objection. In this case the objection was for joinder of a party who had no interest. No doubt, where the plaintiff had no interest, that would also be a good objection if taken by demurrer. His honor said that, as the objection was taken at the hearing, he had the greatest possible reluctance to accede to it. Mary Church Pearce was the heiress, and was not an improper person to join in the reconveyance; her concurrence would make the assurance doubly sure. There could be no doubt as to where the legal estate really was, but his honor thought that it would be straining the rules of the court, and against the justice of the case, if he were to allow this objection.

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LADBROKE v. BLEADEN.<sup>1</sup>

June 12, 1852.

*Practice — Staying Proceedings in an Administration Suit, a Decree having been obtained in another Branch of the Court for Administration of the same Estate.*

Where there are two suits for the administration of the same estate filed in different branches of the court, and a decree has been obtained in one suit, in order to stay proceedings in the other suit, application should be made in the suit in which the decree has been obtained.

THIS was a suit instituted by a creditor against executors for the administration of the estate of their testator. Two other suits had been instituted for the administration of the same estate, one in Vice-Chancellor Turner's court by a creditor of the name of Brunton, and the other in Vice-Chancellor Parker's court by a creditor of the name of Barry. A decree having been made in the suit in this court, notice thereof was given to the plaintiffs in the other suits, and a motion was made before Sir G. Turner, V. C., by the defendant Bleadon, in the suit of *Brunton v. Bleadon*, to stay the proceedings in that suit. His honor, however, was of opinion that the application ought to have been made in the suit in which the decree had been obtained, in the same manner and upon the same principle as when, after a decree in an administration suit, a creditor is proceeding at law he will be restrained by the court in which the decree has been made. His honor was, therefore, of opinion that the application ought to have been made at the Rolls, and refused the motion.

*Speed* accordingly now moved in this court, in the suit of *Ladbroke v. Bleadon*, to stay proceedings in the suit of *Brunton v. Bleadon*. He cited, as to costs, *West v. Swinburne* 14 Jur. 360, and *Davey v. Plastoed*, 14 Jur. 388.

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<sup>1</sup> 16 Jur. 851.



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*In re The Trust Estate of Armand Guibert, &c.*

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*Prendergast*, for Brunton opposed the motion, on the ground of irregularity; the motion to stay the proceedings in the suit of *Brunton v. Bleaden* ought to have been made in the court to which that suit was attached; and he cited, in support, *White v. Johnson*, 2 Ph. 689.

Sir J. ROMILLY, M. R., considered that this court was the proper court in which the application ought to be made, and made an order staying the proceedings in the suit of *Brunton v. Bleaden*, Brunton to be at liberty to prove his debt in *Ladbroke v. Bleaden*. But, as Brunton's debt was disputed, the question whether, in the event of a deficiency of assets, Brunton's costs should be paid in full, before any dividend was made amongst the creditors, was reserved.

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*In re THE TRUST ESTATE OF ARMAND GUIBERT and ANN HAYLING* his Wife; and *in re THE 10 & 11 VICT. c. 96*, (The Trustee Relief Act), and *THE 13 & 14 VICT. c. 60*, (the Trustee Act, 1850).<sup>1</sup>

July 17, 1852.

*Practice — Appointment of Foreigners to be Trustees — Investment in Foreign Funds.*

By a deed-poll declaring the trusts of certain sums of stock, power was reserved to the trustees to invest the trust moneys in the French funds. The trustees, although applied to by the tenant for life to make such investment, refused to do so, and paid the trust funds into court under the Trustee Relief Act. Upon a petition presented by the tenant for life, praying for the appointment of three foreigners resident in Paris as trustees in the room of the old ones, and the transfer of the trust funds to them accordingly, the court refused to make the order.

By a deed poll dated the 31st October, 1842, under the hands and seals of three persons therein mentioned, of the name of Williams, the said Messrs. Williams declared that they and their substitutes, to be appointed as hereinafter mentioned, would thenceforth stand possessed of the sum of 500*l.* stock in the consolidated 3*l.* per cent. annuities, and the sum of 500*l.* stock in the 3*l.* per cent. reduced annuities, then respectively standing in their names in the books of the governor and company of the Bank of England, and of all stocks, funds, and securities in which the same, or any part thereof respectively, should be invested, upon trust, from time to time, during the joint lives of the said Armand Guibert, therein described as of No. 57, *Quai de l'Horloge*, Paris, engineer, and the said Ann Hayling, his wife, to pay the annual income arising therefrom to the said Ann Hayling Guibert, for her separate use, free from marital control, and without power of anticipation; and after the decease of either of them,

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<sup>1</sup> 16 Jur. 852.

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*In re The Trust Estate of Armand Guibert, &c.*

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upon trust for the survivor of them, for his or her own use during his or her life; and after the decease of the survivor of them, upon trust to transfer all the said stocks, funds, and securities to such child, or, if more than one, equally among all such children of the said Ann Hayling Guibert, by her then or any future husband, as in manner therein mentioned; and in case there should be no child of the said Ann Hayling Guibert who should have attained or should attain the age of twenty-one years, or die under that age, leaving issue living at his or her death, then upon trust to transfer all the said stocks, funds, and securities unto the person or persons who should be entitled to the residue of the personal estate of the survivor of them, the said Armand Guibert and the said Ann Hayling, his wife, according to the laws, testamentary or successional, as the case might be, of the place of such survivor's nativity. And by the said deed-poll the said trustees retained and reserved to themselves and their substitutes, amongst other things, full power, but not without the previous consent, in writing, of the said Armand Guibert and his said wife, or the survivor of them, so long as they or one of them should be living, from time to time to sell and dispose of the said stocks, funds, and securities, or any part thereof respectively, and to invest the money to arise from such sale either in any government or real securities in France or England, or in the purchase of any estate or estates of freehold, copyhold, leasehold, or any other tenure, in France or England, to be held by them upon the same trusts and provisions as were therein expressed concerning the said stocks, funds, and securities, and the annual income arising therefrom, or as near thereto as might be. And the said trustees also, amongst other things, retained and reserved to themselves and their substitutes full power, but not without such consent as aforesaid, from time to time to vary and change the same stocks, funds, and securities, and sell the said estates, and purchase others in lieu thereof, as often as should be thought fit; and also full power at any time or times, and from time to time, at the request of the said Armand Guibert and his said wife, or the survivor of them, to lay out and invest the whole or any part or parts of the produce of the said stocks, funds, and securities, estates, and premises, in the purchase of any annuity or annuities, in France or England, upon such securities as they, the said trustees, or their substitutes should think fit, such annuity or annuities to continue during the lives of the said Armand Guibert and his said wife, and the life of the survivor of them, for the purpose of augmenting the annual income of the said Armand Guibert, and of his said wife, if he should survive her; and the same annuity or annuities to be held upon the like trusts, except the trusts to take effect after the decease of the survivor of them, the said Armand Guibert and his said wife, and subject to the same restrictions against alienation and anticipation and otherwise, as were therein before contained. And the said trustees retained and reserved for themselves and their substitutes full power, in case they or either of them, or their or any or either of their substitutes, should die or become unwilling or unable to act in the trusts thereby created, to appoint a

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proper person as substitute in the place of every one of them, the said trustees, respectively, and their substitutes, who should so die, or become unwilling or unable to act as aforesaid; such last-mentioned power to be exercised by such of them and their substitutes as should from time to time be living, and willing and able to act, or by the executors or administrators of the last survivor of them and their substitutes. The aforesaid sums of 500*l.* consolidated 3*l.* per cent. annuities, and 500*l.* reduced 3*l.* per cent. annuities, were at the date of the said deed-poll, and until the same were transferred in manner hereinafter mentioned, continued to be standing in the names of the said trustees in the books of the governor and company of the bank of England, and all dividends which accrued due thereon were from time to time until the annuities were so transferred as aforesaid, duly paid to the said Ann Hayling Guibert, in pursuance of the trusts declared by the said deed-poll. There were three children of the marriage, two only of whom were living at the date of the application, both of them being infants; the remaining child had died some time previously, an infant, and unmarried. All the children were born in France, and had always lived there, and the father and mother were permanently resident there. Under these circumstances, Madame Guibert became desirous that the trust moneys should be invested in the French funds, and applied to the trustees to invest the trust funds accordingly, under the power for that purpose reserved to the trustees by the deed-poll. The trustees, however, refused to do this, and transferred the said two several sums of stock into court under the Trustee Relief Act. A petition was now presented by Madame Guibert, praying that three persons therein named, all of them being foreigners, and resident in Paris, might be appointed trustees of the trust funds in the place of the former trustees thereof, and that the two several sums of stock which had been transferred into court might be transferred into the names of such new trustees accordingly, to be held by them upon the trusts of the deed-poll of the 31st October, 1841. The petition was accompanied by an affidavit as to the fitness of the parties named to be appointed trustees.

*Baggallay*, for the petition, cited *Meinertzhagen v. Davis*, 1 Coll. 353.

Sir J. ROMILLY, M. R. I do not think I can make the order asked for in this case. If these gentlemen are appointed, they might transfer the property into the French funds; and then I do not know but that by the law of France the husband and wife might call upon the trustees to pay over the whole of the trust fund to them. The case of *Meinertzhagen v. Davis*, 1 Coll. 353, which has been cited, was different from this; that was the case of an appointment by the parties themselves under the power in the settlement. That is a very different thing from this court appointing trustees. I do not think I can make the order. I will allow it to stand over, so as to enable you to search for authorities if you please, or I will refuse the order

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*In re Hazeldine.*

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now, so as to enable you to bring it before the Lords Justices if you like.

*Baggallay* preferring the latter course.

*Petition dismissed accordingly.*

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*In re HAZELDINE.*

May 25, 1852.

*Appointment of new Trustee.*

The court has no jurisdiction, under the Trustee Act, 1850, to appoint a new trustee of a term of which there is no subsisting trustee.

By a marriage settlement, dated 1824, a term of 1000 years had been created in certain hereditaments, and vested in A, B, and C, their executors, administrators, and assigns, upon trust, by sale or mortgage thereof, to raise a sum of 7,000*l.* for the benefit of younger children who should be entitled to claim under a power in the settlement enabling the tenants for life to appoint that sum. The surviving trustee of the term was now dead intestate, and no administration had been taken out to his estate.

*C. P. Phillips* moved to confirm the Master's certificate for the appointment of a new trustee, under the Trustee Act, 1850, 13 & 14 Vict. c. 60. *In re Frost's Settlement*, 15 Jur. 644, s. c. 2 Eng. Rep. 40, and *In re Tyler's Trust*, 15 Jur. 1120; s. c. 8 Eng. Rep. 96, were referred to, and the order was attempted to be obtained upon the construction of the 32d section of the act, taken in conjunction with the 34th—the latter clause of the 34th section, which enacts that the order of the court shall have the same effect “as if the person or persons who, before such order, were the trustee or trustees, if any, had duly executed a conveyance,” clearly contemplating the case of there being no existing trustee at the date of the order.

Sir G. TURNER, V. C., declined to make the order, stating that the jurisdiction of the court is founded on sect. 32, which only enables the court to appoint a new trustee or trustees “in substitution for or in addition to any existing trustee or trustees,” and that the words “if any,” in the 34th section, did not enlarge the 32d section. His honor also intimated an opinion that the owners of the fee ought to have been served with notice of motion.

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Groves v. Lane.

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GROVES v. LANE.<sup>1</sup>

June 29, 1852.

*Claim—Mortgagee—Allegations—Administrator ad litem—Amendment.*

A legal mortgagee may maintain a creditor's suit.

In such a suit an administrator *ad litem* of the deceased mortgagor does not sufficiently represent him.

The case stated on a claim must be such as would not render a bill demurrable if stated on a bill.

Amendment of defective claim allowed on payment of the costs of the day.

In this case a claim had been filed by Levi Groves, on behalf of himself and all other the unsatisfied creditors of Jonathan Lane, deceased, stating that by indenture of the 16th October, 1812, Jonathan Lane had demised to Benjamin House certain shares of hereditaments, in the Isle of Portland, "for the term of 500 years, subject to a proviso for cesser of the said term, on payment by the said Jonathan Lane, his heirs, executors, or administrators, unto the said Benjamin House, of the sum of 200*l.*, with lawful interest, on the 16th April, 1813, but which payment was not made." The claim further stated the death of Jonathan Lane intestate, and that Levi Groves, the plaintiff, was his legal personal representative, and the death of House, and that the executors of House had renounced, but that his will had been proved by the plaintiff, Groves, and "that there is now due to the said Levi Groves, as executor of the said Benjamin House, under or by virtue of the said mortgage, the principal sum of 200*l.*, with lawful interest thereon, from the 16th October, 1847, up to which time all interest on the said mortgage was paid by the said intestate and his said widow and co-heirs; and it is alleged that there are other unsatisfied debts of the said intestate;" that Groves claimed "to be paid his said debt off, and the costs of this suit, and in default he claims to have the hereditaments comprised in and affected by the said mortgage sold, and the proceeds, so far as they will extend, applied in payment of the said debt; and also to have the said intestate's personal estate, and also the hereditaments of which the said intestate died seized, and the rents and profits of the intestate's hereditaments received by the defendants, administered in this court, on behalf of himself and all other the unsatisfied creditors of the said intestate."

*J. Russell* and *F. T. White*, in support of the claim.

*Cole*, for some of the gavelkind heirs of Jonathan Lane, objected

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<sup>1</sup> 16 Jur. 854.

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Groves v. Lane.

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that this was not a claim for a foreclosure, and that it could not be supported as a creditors' claim, as there was no allegation of any debt being due from the defendants.

*E. Webster*, for parties in the same interest, cited *Brocklehurst v. Jessop*, 7 Sim. 235.

*Prior*, for another defendant, objected that the administration taken out to Jonathan Lane was only *ad litem*.

*Bowring*, for another defendant, objected that the creditor, being a legal mortgagee, could not maintain a suit for administration on behalf of the other creditors. Coote's Mort. 499; *Burney v. Morgan*, 1 Sim. & S. 358.

*J. Russell*, in reply, said that the allegations of debt in the claim were sufficient, and that the claim followed the form prescribed by the general orders; that whatever might have been the rule formerly, it was now the constant practice for a legal mortgagee to file a creditors' bill. The administration *ad litem* was sufficient. *Davis v. Chanter*, 2 Ph. 544. If not, we shall have leave to amend. *Creasor v. Robinson*, 15 Jur. 1049, s. c. 11 Eng. Rep. 332.

SIR R. T. KINDERSLEY, V. C. One objection was, that the claim was filed by a legal mortgagee, on behalf of himself and all other creditors, for the administration of the estate and payment of debts, whereas the remedy is a bill for foreclosure. I confess my impression is, that bills innumerable have been filed by legal mortgagees, and I do not see where the objection is. If he is a creditor he may file his bill as a creditor; he may abandon his security, or he may say, "Realize my security, and if it is deficient let me be paid with the other creditors." The next objection is, assuming that a legal mortgagee may file a creditors' bill, that, if the legal mortgagee be not a creditor, it is clear he cannot file a bill; and if he files a bill or claim, he must allege himself to be a creditor. Now, it appears to me that that is a very serious objection. Here is a party who has filed a bill on behalf of himself and the other creditors, alleging not, in terms, that he is a creditor, but alleging that a mortgage was made to his testator to secure 200*l.*; that payment was not made; and asking for the usual relief in a creditors' suit, including such relief as he would be entitled to as mortgagee. Now, whatever was intended by the orders which introduced the proceedings by claim, I apprehend this, at least, ought to be a fixed rule—that if the claim states the case in such a manner as, if stated upon a bill, would render the bill demurrable, the claim cannot be sustained. I am sure it never was intended that you should, for purposes of brevity, omit the whole groundwork of the claim. You must state the whole ground of relief as shortly as you choose; but if the party does not state the ground of relief, he will not be allowed to supply the defect by affidavit. I think, that if this suit had been instituted by bill, it would be

demurrable. There is no positive allegation at all that he is a creditor, and the question is, whether, though there is no positive allegation, there is that which would lead the court to think it very probable that he is a creditor, and induce the court not to dismiss the claim, but give leave to set matters right. Now, in the first place, the claim purports to be by Levi Groves, on behalf of himself and the other creditors. There is an implication that he is a creditor, and there is a presumption on the ground that there was a mortgage made. I think I ought to allow the objection, but only to the extent of allowing the plaintiff to set the parties right; and I will give him leave to amend.

The next objection is, that there is no legal personal representative of the mortgagor, and that you must have, not merely an administrator *ad litem*, but a general administrator. The answer is, that administration *ad litem* is binding not only against him and every administrator *ad litem*, but is binding against any one who would take out general letters of administration. But what would be the result of a decree made giving the relief asked by the claim? It will be a decree for the sale of this estate; and if the sale should produce more than sufficient to pay the amount of debt, the rest is personal estate, which may have to be got in, and also all proceeds of any other real estate will have to be applied in payment of the other creditors. And who is to administer that? Into whose hands is that to go? This administrator *ad litem* can do nothing. Suppose the personal estate outstanding, and that the Master reports to that effect, to whom is the court to give directions as to the getting it in? The administrator *ad litem* cannot get it in. It appears to me that the objection is valid, and that you cannot have a general administration of the estate without a general administrator. If you merely wanted a decree to bind the estate, an administrator *ad litem* would be sufficient; but here you want to do more — you want to administer it, and to get it in; and you want not merely the person upon whom the duty devolves of getting a decree binding upon the estate, but upon whom the duty devolves of getting in the outstanding property, and taking the accounts, and seeing to the payment of the debts, and dividing the surplus. It appears to me that it is a valid objection, and therefore it would be necessary, if there were no other objection, that the claim should stand over for the purpose of setting it right, by adding parties. What I shall do is this — if the plaintiff chooses to take these terms — direct the cause to stand over, with liberty to amend, by making a proper administrator a party, and introducing allegations of the existence of the debt; but that must be upon terms of setting the defendants right as to the costs of these proceedings. The costs of the day are, I believe 10*l.*; that will not be sufficient; it must be the taxed costs of the day.

*Cole* stated, that in such cases it was the practice to dismiss the claim without prejudice. *Watts v. Hyde*, 2 Ph. 406.

His honor, however, stated that he should allow leave to amend, as it was a mere slip, and did not affect the nature of the relief intended to be asked.

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Cotton v. Clark.

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COTTON v. CLARK.<sup>1</sup>

June 4, 1852.

*Practice—Costs of Bankrupt defaulting Trustee—Set-off.*

In a suit to administer the estate of a testator, an executor had retained balances in his hands, and had subsequently become bankrupt:—

*Held*, that he was entitled to his costs, although he was charged with interest on the balances in his hands from time to time.

*Held*, also, that he was entitled to have his costs out of the estate, and that they were not to be set off against what should be found due from him in respect of interest on the balances in his hands.

THIS was a suit to administer the estate of Robert Chilver, instituted by parties interested under his will. The testator made Richard Nice and Francis Clark his executors, and died on the 22d October, 1843. His will was shortly after proved by both executors. Richard Nice died in the month of March, 1845, insolvent, leaving Francis Clark, his co-executor, surviving. The two executors during the lifetime of Nice, and Francis Clark, the surviving executor, after Nice's death, kept balances of the testator's personal estate, uninvested, at the banker's, from the 30th December, 1843, when there was a sum of 41*l.* 6*s.* 10*d.*, and the 27th June, 1844, when there was a sum of 889*l.* 1*s.* 4*d.*, down to the 26th January, 1847, when there was a balance of 724*l.* 14*s.* 7*d.*, which was shortly afterwards invested in consols. On the 8th October, 1847, Francis Clark became bankrupt, and the bill was filed on the 8th March, 1848. Besides the balances, a sum of 24*l.* was found due from the executor, but no more, on his general account; but it did not appear when this balance arose, whether before or after the bankruptcy. The common administration decree having been made, the cause now came on for further directions.

*Roupell and Elderton*, for the plaintiffs.

*Glasse and Hoare*, for the defendant, Francis Clark.

Sir J. ROMILLY, M. R., said, he was of opinion that this was not a case in which he ought to deprive the executor of his costs. He thought, however, that he ought to pay interest on the balances in his hands from time to time.

*Roupell and Elderton*, for the plaintiffs, then asked that the costs of the defendant, Clark, might be set off against the interest payable on the balances in his hands.

*Glasse and Hoare*, for the defendant, Francis Clark, contended, upon



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*Ex parte Davies, &c.*

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principle, and upon the authority of *Samuel v. Jones*, 2 Hare, 246, that the costs payable to the defendant, and which had all arisen since his bankruptcy, (the suit not having been instituted until after the bankruptcy), ought not to be set off against a debt which had been discharged by his bankruptcy.

Sir J. ROMILLY, M. R. If the defendant, Clark, were solvent, the one would be set off against the other; but the case of *Samuel v. Jones* expressly decides that the court will not set off a debt of this kind against the costs incurred subsequently to the bankruptcy, and to which the defendant is entitled. I cannot distinguish this case from *Samuel v. Jones*. I am of opinion that this is a debt which accrued due from the defendant prior to his bankruptcy, and that I am precluded by the case of *Samuel v. Jones* from decreeing that it shall be set off against the costs which are now coming to him. The plaintiffs, however, must be at liberty to make such proof as they may be advised, under the defendant's bankruptcy, for the interest on the balances. With respect to the balance of 24*l.* found to be due from the defendant, as it did not appear whether it had arisen before or after the bankruptcy, it was agreed that it should be considered as having arisen since the bankruptcy, and consequently as not barred by the certificate, and that it should be set off against the costs coming to the defendant.

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*Ex parte DAVIES; In re THE 11 GEO. 4 & 1 WILL. 4, c. 60, and THE TRUSTEE ACT, 1850.*<sup>1</sup>

*Costs charged on Inheritance—Trustee Act, 1850, s. 51.*

Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4*l.* per cent., might form a charge on the inheritance.

THIS was the petition of Mary Davies, the tenant for life of freehold premises known as the Western Exchange, Burlington Arcade. The Master's report made in this matter upon a former petition found, that by a settlement, dated in January, 1829, the premises in question were vested in Timothy Davies, in trust for Mary Davies for her life, and upon her death, in trust to sell, and to divide the proceeds among several persons therein specified, with the usual power of appointing new trustees exercisable by Mary Davies during her life; that Timothy Davies having died, Mary Davies duly appointed Henry Philip Davies to be trustee in his place; that Timothy Davies died intestate,

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<sup>1</sup> 16 Jur. 882.

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*Strutt v. Braithwaite.*

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and that it could not be discovered who was his heir. The petitioner prayed the confirmation of the report, and that an order might be made under the Trustee Act vesting the legal estate in Henry Philip Davies upon the trusts of the settlement, and that Henry Philip Davies might, upon consent, pay the costs of the proceedings, and that such costs, with interest at 4*l.* per cent., might form a charge upon the inheritance.

Sir J. PARKER, V. C., expressed a doubt as to whether he had any jurisdiction to make the proposed order as to the costs.

*Dart*, in support of the petition, referred to the 51st section of the stat. 13 & 14 Vict. c. 35, as authorizing the proposed order.

Sir J. PARKER, V. C., after some hesitation, made the order.

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STRUTT V. BRAITHWAITE.<sup>1</sup>

March 15, 1852.

*Settlement — Construction — Power not authorising exclusive Appointment.*

By a marriage settlement, real estates of the intended wife were conveyed to trustees in fee, upon trust, after the marriage, to pay the rents to the husband for life, and then to the wife for life, and after the death of the survivor, to pay the rents towards the maintenance of "all and every the child or children" of the marriage, "until such child or children" attained twenty-one; "and when and as such child or children respectively" attained twenty-one, "to convey the same premises unto such child or children, in such manner, shares, and proportions, and for such use, estate, and estates," as the husband and wife jointly, or as the survivor of them alone, should appoint; and in default thereof, "to convey all the same premises, with the appurtenances, unto and amongst such children equally, share and share alike, to hold as tenants in common, and not as joint tenants: and if there should be but one such child who should live to attain the age of twenty-one years, then upon trust to release and convey all the same premises, with the appurtenances, unto such only child, and his or her heirs for ever;" if no issue, or all such issue should die without issue in the lifetime of the parents, there was a gift over:—

*Held*, that the power did not authorize an exclusive appointment to some only of the children.

*Held*, also, that, under the gift in default of appointment, all the children of the marriage were entitled to vested interests on their respective births.

*Held*, further, that the children took estates in fee simple under the gift in default of appointment.

By an indenture, bearing date the 13th April, 1784, grounded on a lease for a year, and made between Sarah Susannah Strutt, by her then name of Sarah Susannah Freeman, of the first part, John Strutt (since deceased) of the second part, and the Rev. Henry Mayo, (since deceased), Joel Oseland, (since deceased), and Nathaniel Taylor, (since

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*Strutt v. Braithwaite.*

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deceased), of the third part, (being a settlement made previously to and in consideration of the marriage then intended between the said John Strutt and Sarah Susannah Strutt), the said Sarah Susannah Strutt, in pursuance of the agreement therein on that behalf contained, and for the considerations therein expressed, did, with the privity and approbation of the said John Strutt, release unto the said Henry Mayo, Joel Oseland, and Nathaniel Taylor, and their heirs, certain real estates of which she was then seised in fee, "to hold the same unto the said Henry Mayo, Joel Oseland, and Nathaniel Taylor, their heirs and assigns, upon trust that they, and the survivors and survivor of them, and the heirs of the survivor of them, should stand seised of the said hereditaments and premises, to the use of the said Sarah Susannah Strutt and her heirs, until the said then intended marriage should be duly solemnized; and from and immediately after the solemnization thereof, then upon trust to pay to or otherwise permit the said John Strutt and his assigns, during the natural life of the said John Strutt, to receive and take the rents, issues, and profits of the same premises for his own proper use; and after the decease of the said John Strutt, then upon trust to pay unto, or otherwise permit the said Sarah Susannah Strutt and her assigns, during the natural life of the said Sarah Susannah Strutt, to receive and take the rents, issues, and profits of the same premises for her own proper use; and from and immediately after the decease of the survivor of them, the said John Strutt and Sarah Susannah, his then intended wife, then upon trust to pay and apply the rents, issues, and profits of the same premises towards the maintenance and education of all and every the child or children of the said John Strutt on the body of the said Sarah Susannah lawfully to be begotten, until such child or children should attain his, her, or their age or ages of twenty-one years; and when and as such child or children respectively (if more than one) should attain the said age of twenty-one years, then upon trust to release and convey the same premises unto such child or children, in such manner, shares, and proportions, and for such uses, estate, and estates, as they, the said John Strutt and Sarah Susannah, should jointly in their lifetime, or which the survivor of them, the said John Strutt and Sarah Susannah, should alone, by any deed or instrument to be by them jointly executed, or executed by the survivor of them, in the presence of three or more credible witnesses, or by the last will of the survivor of them, the said John Strutt and Sarah Susannah, or any deed or writing purporting to be or in the nature of a last will and testament, to be executed and attested in the presence of three or more credible witnesses, give, devise, direct, limit, or appoint; and for want of and in default of any such deed, will, disposition, direction, or appointment, then upon trust to release and convey all the same premises, with the appurtenances, unto and amongst such children equally, share and share alike, to hold as tenants in common, and not as joint tenants; and if there should be but one such child who should live to attain the age of twenty-one years, then upon trust to release and convey all the same premises, with the appurtenances, unto such only child, and his or her heirs forever. Provided, that in case it should

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Strutt v. Braithwaite.

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happen there should be no such lawful issue of the said then intended marriage, or, being any, all such issue should happen to die without leaving any lawful issue in the lifetime of both the said John Strutt and Sarah Susannah, his then intended wife, or after her decease and in the lifetime of the said John Strutt, then, and in either of such cases, the said trustees, and the survivors and survivor of them, and the heirs of such survivor, should stand seized of and convey the same premises to such uses as the said Sarah Susannah should by any deed or will, to be executed, published, and attested as therein mentioned, (and notwithstanding her coverture), direct or appoint, to take effect from and immediately after the decease of the survivor of them, the said John Strutt and Sarah Susannah, his then intended wife, or their issue under the age of twenty-one years, and without issue as aforesaid; and in default of and subject to any such last-mentioned direction and appointment, upon trust to convey the premises to the right heirs of the said Sarah Susannah. Provided further, that in case the said then intended marriage should take effect, and that the said John Strutt should happen to die in the lifetime of the said Sarah Susannah without leaving any lawful issue by him begotten on her body then living, then and in such case they, the said Henry Mayo, Joel Oseland, and Nathaniel Taylor, and the survivors and survivor of of them, and the heirs of such survivor, should immediately after the decease of the said John Strutt without issue as aforesaid, release and convey the same premises unto and to the use of the said Sarah Susannah, her heirs and assigns, or unto such person or persons as she should direct and appoint."

The marriage between the said John Strutt and Sarah Susannah Strutt was duly solemnized, and there were issue of such marriage eight children, and no more, namely, William Freeman Strutt, Joseph Henry Strutt, Eliza Susannah Strutt, (all since deceased), Sarah Strutt, and Maria Strutt, George Strutt, (since deceased), Louisa, the wife of George Mott Braithwaite, and Matilda Strutt. The said Nathaniel Taylor survived his co-trustees, and died intestate as to the legal estate in the said trust premises, and it was not known who was his heir. The said William Freeman Strutt died in the same month of July, 1799, under the age of twenty-one years, and without having been married, leaving his brother, the said Joseph Henry Strutt, his heir at law. By an indenture, bearing date the 2d May, 1837, being a settlement in contemplation of the marriage then intended and shortly afterwards solemnized between Mrs. Braithwaite and her then intended husband, Mrs. Braithwaite's interest under the above settlement was covenanted to be conveyed to the said Joseph Henry Strutt, Joseph Lythgoe, and Richard Mott, in fee, upon trusts for the benefit of the said Mrs. Braithwaite and the children of the said marriage. The marriage between the said George Mott Braithwaite and Louisa Braithwaite was shortly after the date of the last-mentioned indenture duly solemnized, and there were issue of the said marriage three children, and no more, namely, Edmund Braithwaite, Albert George Braithwaite, and Constantine John Braithwaite. George Strutt died in the month of April, 1832, after having attained the age of twenty-

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*Strutt v. Braithwaite.*

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one years, intestate, and without having been married, leaving his brother the said Joseph Henry Strutt, his heir at law. And the said Eliza Susannah Strutt died in the month of June, 1834, after having attained the age of twenty-one years, intestate, and without having been married, leaving her father, the said John Strutt, her heir at law. The said Sarah Susannah Strutt died in the month of July, 1830, without having joined with the said John Strutt in making any appointment in favor of their children of the hereditaments and premises comprised in the said indenture of the 13th April, 1784, in exercise of the power in that behalf in the same indenture contained.

By an indenture, dated the 12th January, 1835, and made between the said John Strutt of the one part, and the said Joseph Henry Strutt, Sarah Strutt, Maria Strutt, and Matilda Strutt, of the other part, and duly executed in the presence of three credible witnesses, the said John Strutt, in exercise of the power reserved to him by the said indenture of the 13th April, 1784, appointed that all and singular the hereditaments and premises comprised in the said indenture of the 13th April, 1784, should, subject to his life estate therein, go, remain, and be unto the use of the said Joseph Henry Strutt, Sarah Strutt, Maria Strutt, and Matilda Strutt, equally, as tenants in common, and their several and respective heirs and assigns for ever. And by the same indenture, the said John Strutt further directed the trustees named in the said indenture of the 13th April, 1784, or the survivors or survivor of them, or the heirs or assigns of such survivor, immediately after the decease of the said John Strutt, to convey or otherwise assure the said hereditaments and premises unto and to the use of the said Joseph Henry Strutt and the said plaintiffs, as tenants in common, and their respective heirs and assigns accordingly. The said Joseph Lythgoe died, and the said Joseph Henry Strutt died in 1848, after having attained the age of twenty-one years, intestate as to his real estate, leaving George Henry Strutt, his eldest son and heir at law. The said John Strutt made a will, dated the 21st June, 1848, and thereby gave all his real estate unto his four daughters, the said Sarah Strutt, the said Louisa Braithwaite, and the said plaintiffs, Maria Strutt and Matilda Strutt, in equal shares, as tenants in common, and their respective heirs and assigns. The said testator died on the 19th May, 1850, without having revoked or altered his said will. The said Sarah Strutt, Maria Strutt, and Matilda Strutt filed the bill in this suit against George Mott Braithwaite and Louisa his wife, Edmund Braithwaite, Albert George Braithwaite, Constantine John Braithwaite, (an infant, by the said Albert George Braithwaite, his guardian), Richard Mott, and George Henry Strutt, (an infant, by Eliza Strutt, his guardian), defendants, stating the above facts, and praying that it might be declared that the said indenture of appointment of the 12th January, 1835, was a good and valid appointment, in pursuance of the power in that behalf contained in the said indenture of settlement of the 13th April, 1784; and in case such indenture of appointment should be declared to be invalid, that it might be declared who, in the events that had happened, had become entitled to the said trust estates, and premises, and in what shares they had

severally become entitled thereto; and also that, whether the said indenture of appointment should be declared valid or otherwise, the same trust estates and premises might, by virtue and in exercise of the power given to the court by an act intituled "The Trustee Act, 1850," be vested in the persons who should be declared to be severally entitled thereto, in the shares in which they should be declared to be severally entitled thereto.

*Bacon* and *Mott*, for the plaintiffs, contended that the power authorized an exclusive appointment. There was nothing in the words that of necessity signified that the appointment must include the whole number of children. The power was for the father and mother to appoint such children, in such manner, &c., as they should choose. It might be objected, that, if the appointment were invalid, the children took only life estates in default of appointment, for want of words of inheritance; but words of inheritance were not, in fact, wanting, for at the end of the gift to children in default of appointment the words "heirs and assigns" were used, and they must be words of limitation, not only of the estate of the one child mentioned last, but of all the children, if more than one, spoken of previously; and this being a marriage settlement, the object of which was to make a provision for children, there could be no doubt that the court would construe it in their favor as much as possible.

[Sir J. PARKER, V. C. It is a trust to convey to the children. Is it necessary to find words of inheritance in such a case?]

*Sergeant*, for all the defendants except George Henry Strutt, the infant, argued that the power did not authorize an exclusive appointment. The question depended upon the construction of the word "such," which was a mere word of relation, referring to the children mentioned in the preceding sentence. *Vanderzee v. Aclom*, 4 Ves. 771. If the words had been "such of the children," that would have been a different case. If the appointment were invalid, it was a more difficult question how the property went in default of appointment. There were three alternative constructions; one, that only those children who survived the father and mother could take; another construction was, that only the children who attained twenty-one took; and the third was, that all the children took vested interests on their births, in respective shares. The argument for the first construction was, that there was no gift of the *corpus* of the estate, except in the direction to convey it to the children after the deaths of the parents; but this was a marriage settlement, and the court would endeavor to carry out the predominant intention, and make a provision for the children, though they died in the lifetime of their parents. For the second construction he cited *Gordon v. Hope*, 13 Jur. 382. There could be no doubt that the children took estates in fee, for the gift was to trustees to convey to them, which could only be understood to mean to convey to them in fee; and this construction was strengthened by the fact, that the power authorized an appointment to the children in fee, just as the limitation in default was some-

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Strutt v. Braithwaite.

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times read to determine the extent of the power. *Kenworthy v. Bate*, 6 Ves. 793.

*C. Hall* and *C. G. Smith*, for the defendant George Henry Strutt, contended also that the appointment was bad. As to the class to take, the case was governed by *Boraston's case*, 3 Rep. 19, and cases of that kind. *Doe v. Lea*, 3 T. R. 41. The gift over here showed that the issue of deceased children were intended to be provided for. He referred also to *Cohen v. Waley*, 15 Sim. 318.

[Sir J. PARKER, V. C., referred to *Skey v. Barnes*, 3 Mer. 335.]

*Bacon*, in reply:

Sir J. PARKER, V. C. This is a very obscure settlement, and no one in construing it could feel sure what was the construction which the parties contemplated at the time. As to the validity of the appointment by Mr. Strutt, the surviving husband, that was an appointment to some only of the objects of the power; and that raises the question, whether the power did or not authorize an exclusive appointment? That question turns entirely, as it appears to me, on the grammatical force to be attributed to the word "such," in the clause giving the power to appoint to such child or children, in such manner, shares, and proportions, and for such estate and estates, as they, the said John Strutt and Sarah Susannah, should jointly in their lifetime, or the survivor of them appoint. If "such" means such as they should choose to appoint to, there could be no doubt that the power authorized an exclusive appointment. If "such" is to be taken in the sense of "the said," the definite article, the power did not authorize an exclusive appointment.

[His honor read the limitation in the words given above.]

They have, in that sense of the word, merely the power of distributing the estate in shares, and not of selecting the objects. The question is, whether the meaning of the word "such" is throughout this deed the same—whether "such" is used in the sense of "the said." In the first place, I find a trust to "pay and apply the rents, issues, and profits of the premises towards the maintenance and education of all and every the child"—that is the only place in which the word "the" is used—"or children of the said John Strutt on the body of the said Sarah Susannah lawfully begotten, until such child or children"—that must mean all, not excluding any—"should attain his, her, or their age or ages of twenty-one years; and when and as such child or children respectively, if more than one, should attain the said age of twenty-one years, then upon trust to release and convey the same premises unto such child or children;" that must mean the said child or children, following the previous description. The next place where I find it introduced seems to me to remove all doubt whatever—"and in default of any such deed, will, disposition, direction, or appointment, then upon trust to release and convey all the same premises, with the appurtenances, unto and amongst such children equally, share and share alike;" and the word "such" must

there have the same grammatical force as it had where the parents are empowered to appoint. "And if there should be but one such child who should live to attain the age of twenty-one years, then upon trust to release and convey all the same premises, with the appurtenances, unto such only child, and his or her heirs forever." It appears to me, on the language, that he has used "such" there in the place of the definitive article; and if we read it otherwise, we must see it was not the sense in which he meant it. I think, therefore, that the power did not warrant an exclusive appointment, and therefore the appointment is bad, and there must be a declaration to that effect.

Then who are the parties to take in default of appointment? Three constructions are contended for. It was first said, that those children only were to take who survived the surviving parent. I cannot think that there was any ground for that construction. This is a marriage settlement, and the court always endeavors to construe marriage settlements so as not to make the interest of the children depend on their surviving their parents; and in that case referred to by Mr. Sergeant, *Gordon v. Hope*, there was a trust to pay to and among the children, and children who died in the life of the parents were not excluded from taking. No doubt children who died in the life of their parents took vested interests under this gift. The next question is, whether the children who died under twenty-one took any interest? And as to that, I must say that I do not see my way, on legal principles of construction, to exclude any child who died under twenty-one from taking a share in the property on that account. It is on these words of gift in default of appointment that the argument arises—"upon trust to release and convey all the same premises, with the appurtenances, unto and amongst such children equally, share and share alike, to hold as tenants in common, and not as joint tenants; and if there should be but one such child who should attain twenty-one." That, it is contended, is like a clear gift to all of them at twenty-one, for there, by that word "such," is meant such as should attain twenty-one; "and if there should be but one such child who should live to attain twenty-one;" it cannot there mean one child only, but all the children. It is not safe, on an instrument so penned as this, to depart a single step from the literal meaning of the words; you do not know where you may get to. If to attain twenty-one is to be the condition of vesting, what becomes of the share of a daughter marrying under twenty-one, and dying before that age? There is not to be a gift over in case of one dying, leaving lawful issue, during the parents' existence. A daughter, therefore, dying under twenty-one, and leaving a child, would prevent that gift over taking effect, though she took no share, which would be incongruous. I think there is no principle on which I can say that any of the children are to be excluded. The next question is, what estates do they take in default of appointment? I think there is no doubt they took estates in fee. The conveyance to the trustees is in fee, upon trust, after saying they are to convey to such children as the parents should appoint, in default of appointment, to the children as tenants in common; and if only one, then all to such one, his heirs



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Attorney-General v. Donnington Hospital.

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and assigns. In a marriage settlement, which is for the benefit of the children, a direction to convey must mean to convey to children in fee. There must be a declaration that the appointment was bad, and the property is divisible into eighths, of which Joseph Henry Strutt takes three eighths, the devisees of the heir of Eliza one eighth, Mrs. Braithwaite's trustees one eighth, and the three plaintiffs each one eighth; and as one trustee of the original settlement is dead, and the other cannot be found, there must be an order vesting the estate in the persons entitled, according to the declaration.

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THE ATTORNEY-GENERAL v. DONNINGTON HOSPITAL.<sup>1</sup>

April 27, 1852.

*Charity Estates—Scheme—Clause in Leases against Assignment—  
Rendering Accounts to the Attorney-General.*

In settling a scheme for letting lands belonging to a charity, a clause against assigning to "an indigent or improper person" omitted, as likely to lead to litigation.

Where the objects of a charity are numerous, and the sums to be distributed are small, the party charged with the distribution of the charity fund will be directed to lay annually a debtor and creditor account before the Attorney-General, and that notwithstanding there is a regular auditor of the accounts of the charity.

THIS was an information which had been filed for the purpose of having the estates belonging to the charity put upon a more advantageous footing as to letting and otherwise. In settling the scheme, it appeared that all the old leases contained a covenant against assigning to an indigent or improper person. The objects of the charity were very numerous, and the sums to be paid were of very small amount.

Sir J. ROMILLY, M. R., observed, that the clause which had hitherto been inserted in the leases, restraining assignment to an indigent or improper person, was one which was almost certain to lead to great litigation, and suggested its being omitted in all future leases.

R. Palmer, for the relators, and W. M. James, for the Attorney-General, concurring in this view, it was directed that this clause should be omitted in all future leases.

Sir J. ROMILLY, M. R., then observed, that as the sums to be paid were very numerous, and of small amount, the minister who was to distribute them must be directed to lay before the Attorney-General once in every year a debtor and creditor account. This would preserve regularity.

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<sup>1</sup> 16 Jur. 899.

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*In re Battersby's Trust — Hughes v. Wells.*

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*Glasse and Buck*, for the minister, objected to a direction to this effect being inserted, on the ground of there being a regular auditor; but

Sir J. ROMILLY, M. R., said that in all cases of this kind he required such a direction to be inserted, as he found, in many cases, that in reality the audit became a mere form and a nullity.

A direction to the above effect was accordingly inserted.

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*In re BATTERSBY'S TRUST.*<sup>1</sup>

May 29, 1852.

*Practice — Trustee Act, 1850 — Appointment of new Trustees without a Reference — Consent of Parties appointed.*

THIS was a petition for the appointment of new trustees under the Trustee Act, 1850.

*Taylor*, for the petitioner, asked that the parties named in the petition might be appointed trustees without a reference to the Master, upon an affidavit of their fitness.

Sir J. ROMILLY, M. R., asked what evidence there was of the assent of the parties proposed to accept the office.

*Taylor* said that he had the written consent of the parties.

Sir J. ROMILLY, M. R., said that that was sufficient, and he wished it to be known that in all cases of this kind he required the written consent of the parties proposed to be appointed trustees.

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HUGHES v. WELLS.<sup>2</sup>

November 20, 22, and 24, and December 11, 1851, and April 29, 1852.

*Husband and Wife — Separate Use — Defective Appointment to be aided in Equity — Escheat.*

By a settlement, dated the 19th April, 1815, made on the marriage of Sir J. W. with Miss J. D., certain personal property, consisting of money in the funds and money out on mort-

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<sup>1</sup> 16 Jur. 900.

<sup>2</sup> 16 Jur. 927.

*Hughes v. Wells.*

gage, &c., (all belonging to the lady), were settled to the general appointment, by deed attested by two witnesses, of the lady herself, during the joint lives of herself and her husband, with his consent, and after his decease, to her general appointment; and, subject to this power, the trusts were for the lady for life, to her separate use, but without any restraint on anticipation; with remainders over. The marriage took place, and in the same year Sir J. W. made his will, bequeathing and devising all his property, real and personal, to his wife, lady W., and making her his sole executrix. The trustees of the settlement never acted in any way previous to the institution of this suit, and the funds were never transferred into their names, but continued standing in lady W.'s name. After the marriage, lady W., who resided with her husband at a distance from London, executed several powers of attorney to enable her bankers in London to sell out various parts of the funds in settlement, which were sold out accordingly, and paid in to Sir J. W.'s name. The bank powers of attorney required to be executed with the same ceremonies as were required by the marriage settlement to be observed in executing the power of appointment there. Various sums of mortgage money, also in the settlement, were from time to time paid off, and the amounts paid in to his name, invested also in his name in the purchase of consols, and in this manner about 8,000*l.* worth of different stock was, in 1821, standing in the name of Sir J. W., and all checks for current expenses were drawn by Sir J. W., which, in accordance with Lady W.'s written request, were honored by her London bankers out of her separate account. On the other hand, Sir J. W. suffered a legacy of 2,000*l.* to be received, and placed to the separate account of his wife. In 1826, Sir J. W. purchased, at his wife's request, the estate of B., where he habitually resided with his wife. The purchase was taken in the name of Sir J. W. alone in fee. The tenure was customary freehold. Sir J. W. died in 1844, intestate, the will of 1815, not passing after-purchased estate, and without an heir at law. On the present bill, brought after his decease by the personal representative of the last surviving trustee of the settlement of 1815, against those claiming under the lord of the fee by escheat, to establish a lien on the lands for the amount of the purchase money, it was held:—

First, that there had been no such laches as to deprive the plaintiff of his right to sue; on the contrary, he was bound to sue.

Secondly, that the power of appointment was not well exercised by lady W., in the powers of attorney, nor by the assignments of mortgage.

Thirdly, that there was not a defective power of appointment which a court of equity would aid, so far as related to the moneys invested in land.

Fourthly, that there was a defective appointment which a court of equity would aid, so far as respected the sums of money expended by Sir J. W. and lady W., in keeping up their establishment, which was beyond their annual income.

Fifthly, that the lands are subject to the lien of the trustee, to the above extent, in the hands of the lord claiming escheat.

Lady W., surviving her husband, had formally exercised her power of appointment in favour of E., whom she also made her executrix. E. died, leaving B. her executor:—

*Held*, sixthly, that B. was a necessary party to the suit.

Of the consideration which is necessary to support in equity a defective execution of a power of appointment.

Of the intention which is necessary for the efficacy of a deed.

THE bill in this case was filed by the Rev. C. W. Hughes, as the surviving trustee of the settlement made on the marriage of Sir John and Lady Wells, for the recovery of certain portions of the trust funds laid out in the purchase of real property, and in improvements made upon such property and to establish a lien upon the property for the amount so laid out, and for payment thereof; and also for payment out of the estate of Sir John Wells deceased, of any part of the said trust moneys which came to the hands of Sir John Wells, and were not by him expended as aforesaid. The facts were, as stated in the bill and found by the Master, that by a settlement, dated the 19th April, 1815, (being the marriage settlement of Sir John and Lady Wells, then Miss Jane Dealtry), all the real estates of Miss Jane Deal-

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Hughes v. Wells.

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try were conveyed, from and after the solemnization of the marriage, to the joint appointment of the husband and wife, with remainder to her separate appointment in case she survived her husband, with remainder to trustees for Lady Wells for ninety-nine years, with divers remainders over. By a settlement of the personal estate of Miss Dealtry, executed on the same day, all her personal estate (which was considerable, consisting, among other things, of moneys in the stocks, and secured on different mortgages to the extent of 25,000*l.*, besides household furniture, pictures, and other effects) was assigned to trustees, upon trust for such persons, for such estates, and either absolutely or conditionally, at such times, under such powers, &c., as Lady Wells, notwithstanding her coverture, at any time or times, and from time to time, during the joint lifetime of herself and her husband, should, by and with his consent and approbation, testified in writing under his hand and seal, or as she, the said Lady Wells, alone, after the decease of the said John Wells, in case she should survive him, should, by any deed or deeds, writing or writings, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, direct, limit, or appoint; and in default of any such direction, and so far as any such direction should not extend, in trust for Lady Wells for her separate use during her life; and after her decease the trustees were to pay the trust moneys, &c., to such persons as she should by will appoint; and in default of such appointment, to the issue of the marriage; and in default of issue, (there never was any issue), in trust for her next of kin, according to the Statute of Distributions, exclusively of her husband. There was the usual power for changing securities, but no power for laying out the trust moneys in the purchase of land. The power of changing trustees was reserved to Lady Wells; and Sir John covenanted that he would at all times join in any further assignment, &c., of the said trust premises. The plaintiff was the executor of the surviving trustee of the settlement, no trustee having been appointed under the power. The trust funds were never transferred into the names of the trustees of the settlement, nor assigned in any manner otherwise than by the settlement just stated; nor did they, the said trustees, in any manner interfere in the management of the trust, which was left entirely under the control of Sir John and Lady Wells. Lady Wells had, previous to her marriage, kept a separate banking account with Smith, Payne, & Smith; on her marriage she opened, and up to the filing of the bill she still continued, a separate account under her marriage name of Lady Jane Wells, into which account were from time to time paid, among other sums, the rents and issues of the real and personal estate comprised in the said stated indentures of settlement.

It appeared that Sir John had no real estate at the time of the marriage, and little or no personal estate; that his only property consisted of his half-pay as an admiral; and that as Sir John and Lady Wells lived fully up to their income, no accumulations of income could take place. Sir John and Lady Wells, shortly after their marriage, took up their residence at Cuckfield, in Sussex, and on the 1st May, 1815,

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opened an account at Messrs. Hurley's, bankers, at Lewes, in the name of Sir John Wells, which account was continued open up to the time of Sir John's death. In 1817, a legacy of 2,000*l.* consols was bequeathed to Lady Wells, which Sir John declined to receive; and it was, with his sanction, transferred into her sole name, and the dividends were from time to time received by Messrs. Smith, Payne, & Smith, under a power of attorney, and by them placed to the separate account of Lady Wells. Lady Wells had, by a notice dated the 16th October, 1815, authorized Messrs. Smith, Payne, & Smith to honor Sir John's checks on them out of her private account, and from that time down to the death of Sir John, all the moneys by which the account at Messrs. Hurley & Co.'s was supplied were drawn by Sir John's checks on the London bank, and paid out of Lady Wells's separate account at Smith, Payne, & Smith's. In January, 1820, a sum of 500*l.* consols, part of the said sum of 2,000*l.* consols, was sold out by Smith, Payne, & Smith, under a power of attorney from Sir John and Lady Wells, and the proceeds placed to her said separate account; the greater part of this was shortly afterwards advanced to the defendant, William Sergison. This sum was afterwards repaid to Sir John. In January, 1821, another sum of 500*l.* consols, part of the remaining 1,500*l.*, was sold in the same manner, and applied to the general purposes of Sir John and Lady Wells. In July, 1821, a large portion of the personalty included in the settlement of the 19th April, 1815, was transferred into the name of Sir John; and by this means, and subsequent purchases, (which could not, for the reasons before mentioned, have been made out of the savings or accumulations of income), there was in the year 1824, standing in the name of Sir John a sum of 7,436*l.* 19*s.* 7*d.* consols, and 1,050*l.*, 4*l.* per cent. bank annuities. The dividends on these sums were always carried to the said separate account of Lady Wells with Smith, Payne, & Smith. In October, 1825, Sir John Wells, with the concurrence of Lady Wells, contracted for the purchase of the Bolmore estate for the sum of 5,500*l.*, which purchase was ultimately completed, the deposit and whole consideration money being clearly traced to Lady Wells's separate estate, but the conveyance, dated the 17th and 18th March, 1826, was to Sir John Wells in fee, to the usual uses to bar dower; and the Bolmore estate being subject to a lease, Sir John, with the concurrence of Lady Wells, bought up the tenant's interest for 1,000*l.*, and his stock, &c., at 826*l.* more, and entered and commenced a series of extensive improvements on the mansion house and premises. All this expenditure was clearly traced, through the checks and the banker's books, to have been defrayed out of the principal moneys comprised in the settlement of the 19th April, 1815, and other moneys derived from a sale of the real property included in the settlement of realty of the same date.

The bill alleged, that in addition to all the real estate thus acquired, Sir John had applied other parts of the capital in settlement to the purchase of various personal chattels, and otherwise for his own use and benefit. It appeared from the Master's report that Sir John always spoke of the property brought by Lady Wells into settlement

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as being Lady Wells's separate estate; that he was very particular in alluding to it, and frequently used such expressions as that the purchases and improvements were not for his own benefit: that he was averse to the purchase of the estate, and to the building, which was undertaken by her express desire: and that he stated openly that the estate was purchased with Lady Wells's money, and dealt with it as being her separate estate. Sir John died in 1841, having by his will, dated in November, 1815, made his wife his universal legatee and devisee, and sole executrix. But this will did not pass the after-purchased estates; and no person appearing to claim as heir at law of Sir John, and it being alleged that he had left no heir, the lord of the manor claimed by escheat. Against this claim the bill set up the case, that Sir John was a trustee of the estates to the extent of the trust moneys in settlement which had been laid out in the purchase of and improving the estates. The bill then stated the title to the manor of Heyworth, of which the estates were held, and which was vested in the defendant, William Sergison the younger, as the first tenant in tail; the other defendants were other parties having interests in the manor prior to the first estate tail, and not amounting to an estate of inheritance, and Lady Wells. The bill prayed an account of the moneys in settlement which had been possessed by Sir John Wells, and expended by him on the estates in question; and that it might be declared that the plaintiff was entitled to a lien on the said estates for the amount so expended, with interest, and to have such amount, with interest, paid out of the personal assets of Sir John; and if they should be insufficient, then to have it raised and paid by sale or mortgage of the said real estate, and to have an account taken of the other sums of settlement money received by Sir John, and not laid out on the said estates, and also of the other debts of Sir John, and to have them all satisfied out of his personal estate; and if not, then out of his real estate; and that, so far as necessary, this bill might be taken to be on behalf of all the creditors of Sir John, and for a receiver.

By the answer of Lady Wells, it appeared that an Sir John Wells's personal estate had been expended by her in payment of his funeral and testamentary expenses and debts, and was insufficient for those purposes; and that she had out of her own moneys paid several of his creditors, who had agreed thereupon to assign their debts to her; and she claimed to stand in their place as against the estate of Sir John. She also claimed as her own separate property several articles of furniture which were standing in the house at the time of her husband's decease. By an order, dated the 31st January, 1844, the usual inquiries were directed as to the execution of the settlement, and the payment of the moneys comprised in the settlement of the 19th April, 1815, and the expenditure thereof, &c. Lady Wells died on the 30th April, 1844, having devised and bequeathed all her property to her sister, Elizabeth Dealtry, whom she appointed her sole executrix. Elizabeth died in July, 1844, without having ever proved Lady Wells's will, but having by her own will appointed the defendant Beard her executor.

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Beard took out administration to Lady Wells, and the proceedings were revived against him.

*Bethell* and *Prior*, for the plaintiff, the trustee of the settlement.

*Follett* and *E. K. Karlake*, for the defendant Beard, in the same interest.

*Rolt*, *Campbell*, and *Selwyn*, for the other defendants, the Sergisons, claiming by escheat. The two main questions, as between the lord claiming the land by escheat, and those claiming under the settlement, were — first, whether Sir John was not, in fact, to be taken broadly to have purchased as a trustee for his wife; and, secondly, if that should be too broad a proposition, whether, in case he should be proved to have received trust moneys belonging to his wife otherwise than under any appointment of hers in execution of her power, the estate in the hands of the lord should not be declared to be general assets for the payment of that debt. The defendants argued that Lady Wells had, in fact, appointed away the funds under her power, by executing the powers of attorney to Messrs. Smith & Co. to transfer the stock. These powers were the usual printed forms supplied by the bank, properly filled up in writing, and executed under a seal, and in presence of two witnesses. That if this was not a valid execution, it was such an execution, at any rate, as ought to be aided in equity; and, lastly, that the Assets Act, 3 & 4 Will. 4, c. 104, could not be applied against the lord of a manor claiming by escheat.

The following cases were cited and commented on by the plaintiff, and the defendants in the same interest as the plaintiff: *Milne v. Busk*, 2 Ves. jun. 488; *Cocker v. Quayle*, 1 Russ. & M. 535; *Hopkins v. Myall*, 2 Russ. & M. 86; *Reith v. Seymour*, 4 Russ. 263; *Irwin v. Farrar*, 19 Ves. 86; *Rowe v. Rowe*, 2 De G. & S. 294; 12 Jur. 909; *Brookman v. Hales*, 2 V. & B. 45, as to the effect of the power of attorney; *Lyne v. Dighton*, 1 Amb. 409; *Lench v. Lench*, 10 Ves. 511, as to following trust moneys into land; *Lewis v. Maddocks*, 17 Ves. 56, as to improvements; *Viscount Downe v. Morris*, 3 Hare, 394; 8 Jur. 486; *Evans v. Brown*, 5 Beav. 114; *Rogers v. Maule*, 1 Y. & C. C. C. 4; *Denn v. Roake*, Sugd. Pow. 438, 450, 6th ed.; *Boughton v. Sandilands*, 3 Taunt. 342; *Dinning v. Henderson*, 2 Coll. 330; and *Price v. Price*, 15 Sim. 484.

The following cases were cited by the defendants, the persons claiming by escheat: — 2 Sugd. Pow. 96; *Pollard v. Greenville*, 1 Ch. Cas. 10; *Martin v. Mitchell*, 2 J. & W. 413; *Stead v. Nelson*, 2 Beav. 245; *Barford v. Street*, 16 Ves. 135; *Nail v. Punter*, 5 Sim. 555; *Anon.*, Godb. 327, No. 419; *Pawlett v. Delaval*, 2 Ves. sen. 663; *Caton v. Ridout*, 1 Mac. & G. 599; *Beresford v. The Archbishop of Armagh*, 13 Sim. 643; 8 Jur. 262; *Bartlett v. Gillard*, 3 Russ. 149; *The Earl of Kinnoul v. Money*, 3 Swanst. 202; and *Moodie v. Reid*, 1 Mad. 516.

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April 29, 1852. Sir G. TURNER, V. C., (after stating the circumstances up to the filing of the bill). The original bill was filed in the lifetime of Lady Wells against her and the parties interested by escheat. Lady Wells died, and by her will, which was so executed and attested as to be a good execution of the power in the settlement of the 19th April, 1815, reciting the settlement and the power, and expressly in exercise and execution of that power, she gave, devised, bequeathed, directed, and appointed that all her estate, legal or equitable, in the premises at Bolmore, and all right, claim, &c., either at law or in equity, in or upon the same, and all the furniture, plate, books, &c., and all the stocks, funds, and personal estate belonging to her at the time of her marriage, and comprised in the said settlement, and all securities in or upon which the same, or any part thereof, might be invested at the time of her decease, should go, remain, and be to and for the use and behoof of her sister, Elizabeth Dealtry, her heirs, executors, administrators, and assigns forever; and she also gave to her sister, Elizabeth Dealtry, all the residue of her personal estate not comprised in the said indenture of settlement of the 19th April, 1815. She, therefore, by her will dealt with the power as if the trust funds had never been sold out, and as if they were still standing in the names of the trustees of that settlement. Lady Wells left her sister, Elizabeth, her heir at law, and her sister's interests are all represented by the defendant Beard.

The plaintiff's case is supported by Beard, and opposed by the other defendants. The first objection which was taken was to the right to maintain the suit at all. It was urged that the trustees of the original settlement of the 19th April, 1815, never acted, and that it was not competent for them, or rather for the personal representative of the survivor of them, now to sue. But the object of the bill is to recover certain trust funds which were comprised in the settlement—to recover them as against the estate of Sir John Wells; and therefore, to justify this ground of opposition, independent of the rights acquired by those claiming, under the settlement, against Sir John Wells and his estate, the defendants must show that the trusts of the settlement are determined; for, if they are not determined, then this plaintiff not merely is entitled, but is bound to sue. I am of opinion that the trusts are not at an end, and it is therefore necessary to go into the case on its merits.

Three points of defence were raised in the argument to defeat the claim of the trustees to come upon the estate of Sir John. First, whether Lady Wells ever made a perfect appointment of any part of the trust fund in favor of Sir John. Secondly, whether she had power to make, and did make, any effectual disposition or appointment, not being a perfect appointment, in favor of Sir John. Thirdly, whether any portion of the funds not well appointed or disposed of can be recovered from the lord of the fee. On the first point it was contended by the defendants, that the power of appointment was perfectly executed by the powers of attorney for the transfer of stock, and the transfers made on them, and the assignment and release of the mortgage debt due to Lady Wells. But I am of opinion that



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that was no perfect execution of the power. Two things are evidently necessary for the perfect execution of a power—the observance of due formalities, and the presence of an intention to exercise the power by the particular act. This appears from the very nature of powers; unless in pursuance of the authority, the act is no execution of the authority, and it cannot be in execution of the authority unless it be the intention of the donee of the power that it should be so. As in the case of a conveyance by a person having a power coupled with an interest, if there be no intention to exercise the power, then the deed will take effect out of the interest; but if there be an intention, and it cannot take effect out of the interest, then it will take effect under the power. Now, if we look at the acts done, and alleged to be an exercise of the power, we find that the powers of attorney are under the hand and seal of Lady Wells, and with the concurrence of Sir John. But these merely amount to authorizations to the bankers to assign and transfer certain sums of stock into the name of Sir John Wells; they are “authorities,” not “directions,” to do what she could have done, if present, without their intervention. But it is from directions, and not from a mere authority, that the intention to exercise the power must flow, and therefore the formalities must apply to the instrument containing the direction; and I therefore think, that, for any thing contained in these powers of attorney, the power of appointment still subsists. The transfers do not alter the nature of the instruments; in fact, to treat these powers of attorney as executions of the power in the settlement would be to turn instruments of substitution into instruments of alienation.

The case as to the mortgage is not different. It was a mere receipt for the mortgage money upon a transfer by Sir John and Lady Wells of the security. It had no operation as between them. There is an absence of all direct evidence of intention as to whether these instruments should operate as executions of the power. We must gather the intention, if possible, from the acts and circumstances of the parties. It is said that they were living fully up to or beyond their income, and that by an exercise of this power only could they be extricated from difficulty. But, on that supposition, it is most strange that there is no formal execution of the power. The bulk of the property was transferred into the name of Sir John, in 1821, and it is not alleged that there was at that time any intention to deal with it; and, in fact, it was not dealt with until 1825. The income of all the settled property, on the other hand, was all carried to Sir John; and then we have his declarations and statements as to his continuing his wife's separate estate, notwithstanding the management and control being placed in his hands. These were transactions between husband and wife; and in such transactions, when it is intended to set up a gift from the wife to the husband, the evidence should be clear and unmistakable. In the present case I cannot persuade myself that these instruments either were, or were intended to be, an exercise of the power in the settlement. It was next contended that the wife had power to make, and did make, a gift to Sir John by some other means than a perfect exercise of her power of appoint-

ment in his favor ; and that was rested on two grounds ; first, because, having a life estate, coupled with an absolute power of appointment, and the limitation being to her absolutely in default of any exercise of that power, this was equivalent to an absolute estate, and she was, therefore, capable of giving, and did give, the fund to Sir John ; and, secondly, it was argued, that there was, at all events, such a defective exercise of the power of appointment as would be aided by a court of equity. The defendants argued that Lady Wells had, during the joint lives of herself and husband, a power of appointment, not restrained by any formalities. But, on reading the words of the clause containing the power, (as set out *ante* p. 391,) to throw out the words, " by any deed or writing signed by her," &c., from all application to the power given her during the joint lives of herself and her husband, would be a most forced construction of the settlement.

The main object of marriage settlements in general, and it might be said of this settlement in particular, is to throw the protection of formalities round the wife's interest during the coverture ; but this construction would leave the wife's interest exposed to alienation, by even a parol appointment during the coverture, while immediately the coverture was at an end, Lady Wells would not be able to appoint except by a writing under her hand and seal, and attested by two witnesses — imposing cumbersome formalities precisely when they ceased to be necessary, and omitting those formalities when they would be a useful security to the wife. Besides, a construction would be very unreasonable which required the consent of Sir John, under his hand and seal, to a parol appointment of his wife's. These formalities, then, in my opinion, attaching as well to an exercise of the power in the lifetime of her husband as after his decease, is it the case that her life estate, coupled with such a power, amounts to an absolute interest, and that she had power to give, and did give, the fund to Sir John ? *Barford v. Street*, and the expressions of Sir William Grant there, were quoted by the defendants to show that this was so ; but in that case the power had been exercised, and the only question was, whether the instrument creating the power warranted the instrument by which it was executed ; and Sir William Grant's observations were in answer to the argument, that the directions in the codicil in that case were inconsistent with the notion of absolute property in the donee of the power. Then *Irwin v. Farrar*, *Holloway v. Clarkson*, and the observations of Sir John Leach in *Reith v. Seymour* were relied on. But in these cases no formalities whatever were required for the exercise of the power ; and they do not decide that a life estate, coupled with a power, is the same thing with an absolute estate, but only that, where no formality is required for the execution of the power, any act is sufficient which shows the intention ; as in *Irwin v. Farrar*, where the mere filing of the bill by the legatee, to have the fund transferred into her own name, was held a sufficient appointment in her own favor. But some act sufficiently indicative of the intention must be done. I think, therefore, that Lady Wells could not convey this fund except by a perfect appointment under the power.

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Is there, however, such a defective appointment as this court will aid? This point was almost entirely argued upon the ground of a defective execution in favor of Sir John Wells. But the husband is not one of the favored objects in whose behalf a court of equity will interfere. *Moody v. Reid* decided that point. But it was said that Sir John must be treated as a purchaser, and this was put on the consideration of the expensive establishment which he maintained, and his abstaining from appropriating the legacy of 2,000*l*. But I apprehend, that in order to establish the claim of any person as a purchaser, in whose favor a defective execution will be assisted in equity, two things must be clearly shown — the consideration, and the intention, either proved or to be presumed. But I do not think that the expenditure, however lavish, of a wife's property by her husband, constitutes any consideration to the wife for a purchase, for the benefit of her husband, with her money; and though the giving up of a legacy which was given to the wife might, under some circumstances, constitute a consideration moving from the husband, yet it could not prove any intention to purchase; nor could it lead to the presumption of any such intention, under the circumstances of the present case; and even if it could do so under any circumstances, yet in the present case the express finding of the Master, that it was not so treated by the parties, negatives the existence of any such intention.

On this ground alone, then, of a defective execution in favor of Sir John Wells, it would be difficult to maintain that Sir John took an absolute estate in the lands for his own benefit. But, independent of any appointment in favor of Sir John, I think that there is in some degree a case of a defective appointment, which a court of equity should aid. It cannot, I think, be said that there was any defective appointment by Lady Wells in her own favor, which the court could aid. The powers of attorney and transfers and assignments executed by her were not and could not be defective appointments of this description; there was not the remotest intention on her part that they should be so. The proceeds of the funds so transferred and assigned were carried to the separate account of Lady Wells, and it was, therefore, to be inferred that they were considered to be affected by some trust for her separate use. But no such trust existed, except the trust created by the settlement; and it cannot, therefore, be presumed that there was an intention to execute the power, and thus take the funds wholly out of the trust. And again; it is difficult to say, that in the case of the exercise of the power by Lady Wells in her own favor, there could be any such consideration as could call into action the power of this court to aid a defective execution, there being no consideration moving to her from any other person. I think, therefore, that the proceeds of these funds, after they were placed to Lady Wells's account with Smith, Payne, & Smith, must be considered to have remained subject to the trusts of the settlement; but these proceeds, after they had been placed to Lady Wells's account, were, in so far as they were not disposed of in the purchase of the Bolmore estate, and of the lease of that estate, and in improvements upon it, applied to other purposes, and, upon the facts found in this

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report, must, I think, be taken to have been applied to those purposes, and principally for the current purposes of the establishment, by the order and direction of Lady Wells, Sir John Wells being her agent in the application of them; and taking this to have been the case, I think that, as to the moneys so applied, it must be considered that there was a defective appointment, which ought to be aided by this court. Lady Wells had the absolute power over the funds; she could not be justified in applying them to such purposes otherwise than by an exercise of her power, and she received consideration for so applying them. For although the maintenance of the establishment by a husband would be no consideration for a purchase by him from his wife, it cannot, I think, be said, that if a wife thinks proper to keep up an expensive establishment against the wishes of her husband, by means of her separate estate, what was supplied for the establishment would be no consideration to her for payments made out of her estate on that account. If the trust funds had been transferred to the trustees, and Lady Wells had directed the trustees to apply them in payment of her debts, and they had been so applied, such an application of them must, I think, have been supported in equity in favor of the persons to whom the payments were made, and of the trustees, if attempted to be charged in respect of these payments; and the funds having remained in her name subject to the trusts, the same rule must, I think, be considered to apply to them as would have applied to them if they had been transferred.

The case of *Routledge v. Dorrell*, 2 Ves. jun. 357, supports this view. In that case some of the funds subject to the power were, by the direction of the donee, not, as it would appear, accompanied by the prescribed formalities, transferred to an object of the power; and no doubt seems to have been entertained that the power was well exercised as to the funds so transferred. I am of opinion, therefore, that as to so much of the trust funds as were applied otherwise than in the purchase of the Bolmore estate, and of the lease of that estate, and of the improvements upon it, it must be held that they were well appointed and disposed of in equity, and that the plaintiff can maintain no claim in respect of them. But as to the moneys laid out in the purchases and improvements, I think the case is different. These moneys were derived from the trust; they must continue subject to it, unless they were well alienated from it; they could not be so alienated otherwise than by an exercise of the power. There was no perfect execution of it, and, as to these moneys, no consideration to aid a defective execution of it; and if there was a power to give them to Sir John Wells, there was no gift of them to him. I think, therefore, that they must be held to have remained subject to the trusts of the settlement, and that the plaintiff must be held to have the right to recover them, if they are at all recoverable, which depends upon the third point—the rights against the lords of the fee.

Before, however, adverting to this point, it may be right that I should observe upon another most important question which was discussed in the argument of this case, namely, to what extent, if at

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all, the estate of Lady Wells could be affected by her acts and conduct.

It was argued on the part of the defendants, that where a married woman, with a power of appointment over trust funds, has permitted those funds to be received by her husband, neither she nor her appointee could afterwards recall them. And on the other hand, it was insisted on the part of the plaintiff, that the right of the wife's appointee could be defeated only by a previous exercise of the power *modo et formâ* prescribed by the instrument creating it. I am not prepared to adopt either of these arguments to the full extent to which it was carried. The argument on the part of the plaintiff, if adopted to the full extent, would, I think, go far to contradict what was said by Lord Hardwicke in *Ryder v. Bickerton*, 3 Swanst. 80, note, and by Lord Eldon in *Lord Montfort v. Lord Cadogan*, 2 Mer. 3. Those cases, I think, show, that in the opinion of both those most eminent judges, the rights of married women might be barred and their estates affected by active participation in breaches of trust; and if so, it would seem to follow, that when their powers have been exercised, by which the trust funds become their assets, they must be liable for those breaches of trust. But on the other hand, to hold that the fact of a married woman having permitted her husband to receive the trust funds would preclude any right to relief by her or her appointee, would be to defeat the very purpose for which the trust was created, namely, the protection of the wife against the husband.

It is not, I think, necessary to decide this question in the present case; but whenever it may become necessary so to do, I am much disposed to think the true rule to be adopted will be found to be this — the provisions of the settlement are for the protection of the wife; full effect must be given to them; and the court, therefore, before it can hold the estate of the wife to be in any manner affected, must be fully satisfied that the husband has not, in any degree, influenced the acts or conduct of the wife. If, upon the most jealous investigation, the court should be satisfied of this, I see no reason why, the wife having been constituted a *feme sole* by the terms of the settlement, her assets, including the trust funds, which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person not under the disability of coverture would, under the same circumstances, be bound. The modern cases, as to the liability of the estates of married women for their general engagements, seem to me to favor this view; and I think it falls in very much with the opinion of the present Lord Chancellor in *Mara v. Manning*, 2 Jo. & Lat. 311. It is not opposed to Lord Langdale's opinion in *Kellaway v. Johnson*, 5 Beav. 319, which is, I think, the nearest case to the present; for in that case the acts done were for the benefit of the husband, and there was no proof of the wife's concurrence except by a deed executed under his influence; nor is it inconsistent with Sir J. Leach's opinion in the case of *Cocker v. Quayle*, any further than that, upon the grounds which I have suggested, it might have been, though it was not argued in that case

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that the dividends, when they accrue due, would be subject to the indemnity of the trustees.

But this argument, had it been advanced, might have been met by the answer, that the protection there was not against the husband merely, but against the wife herself, and that the trustees could not claim indemnity against a protection so strictly reserved to the wife — an argument which cannot be applied to a power of appointment so long as the exercise of the power renders the fund subject to the liabilities of the appointee. I am much disposed to think, that had the trust funds been transferred to the trustees, and afterwards dealt with in the manner appearing by this report, Lady Wells's estate would, under the very peculiar circumstances of this case, have been liable to the trustees; and that upon this ground also, had it been necessary to resort to it, the plaintiff's title to recover for the benefit of her estate could not, to the extent I have mentioned, have been maintained. With respect to the last question, the right against the lords of the fee, I think it unnecessary to say much upon the subject. It is well settled that trust moneys may be followed into land; and whatever difficulty there might have been in following these moneys into land, as against the lords of the fee, is, I think, removed by the Escheat Act; and even if it were otherwise, I think that, Sir John Wells having been debtor to the trust in respect to these moneys, I should upon the authorities have been bound to hold, as, in the absence of authority, I should myself have decided, that the estate in the hands of the lord is liable for the debt. The decree I shall make will be to declare the lien upon the estate for the amounts which were laid out in the purchase of the Bolmore estate, and the additions and improvements upon it — that can be taken as found by the report; and also declare the debt due from the estate of Sir John Wells. Direct the usual accounts. There must be the usual account of the personal estate of Sir John Wells, and also an order for the sale of the real estate for the payment of debts. The great difficulty which I have had, and, indeed, what has led me to suspend the judgment for such a considerable time, has been the frame of the suit. But I am bound, in justice to Mr. Prior, to say, that I believe it could not have been otherwise. The complication arises from Lady Wells having become the personal representative of Sir John Wells, as well as having a claim in her own right; then making an appointment, and Mr. Beard representing her appointee and executrix; in fact, representing all these parties. I do not know how the suit could have been otherwise framed. They must have their costs.

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*In re The Oundle Union Brewery Co.; Ex parte Croxton.*

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MAUDE v. MAUDE.<sup>1</sup>

March 27, 1852.

*Practice — New Petition — Administration.*

AFTER the presentation of the original petition in this cause, it was thought necessary to take out administration to certain parties who had died previously to the presentation of the petition. This was done, and a new petition was presented, stating this supplemental matter.

*Pemberton*, for the petition, stated that a new petition had been required by the Lord Chancellor's secretary.

*Fleming*, for the respondents.

Sir J. PARKER, V. C., said that the new petition was not necessary, and that it was a pity to have put the parties to the expense of it.

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*In re THE OUNDLE UNION BREWERY COMPANY; Ex parte CROXTON.*<sup>2</sup>

April 15, 1852.

*Trustee for Company — Costs.*

A trustee for a company, having borrowed money for its purposes on his own bond, and the money being afterwards recovered from him in an action by the bond creditor, which the company, in spite of due notice, left him to defend, claimed this money as a debt in the Master's office, on the winding up of the company. The Master disallowed the claim, because he thought there was no authority in the trustee to borrow money for the company. On appeal, an action was directed to try the question of the right to borrow, which was decided in favor of the trustee:—

*Held*, that he was entitled to claim the bond debt, and the costs, charges, and expenses of defending the action and costs in the Master's office, and of the present motion.

IN 1840, the Oundle Union Brewery Company being in want of funds to carry on their business, their directors agreed with John Hudson for the loan by him to the company of 1,000*l.*, and, as a security for the same, it was agreed that George Croxton and William Prentice, as trustees for the company, should jointly give to Hudson their bond for the 1,000*l.* and interest, in the penalty of 2,000*l.* This bond, dated the 2d July, 1840, was accordingly executed by Croxton and Prentice, at the request and by the order of three of the directors of the company, who signed a memorandum to that effect

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*In re The Oundle Union Brewery Co.; Ex parte Croxton.*

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at the foot of the bond. The money was applied to the uses of the company, and interest on the bond was from time to time paid out of the company's funds up to the 1st January, 1850. On the 26th February, 1850, an action to recover the said 1,000*l.* and interest was commenced, of which Croxton gave notice to the company's solicitor, and to Prentice, and to the directors. On the 26th April, 1850, Croxton gave a further notice to the solicitor and directors of the company, under the provisions of the Winding-up Acts, requiring them to pay the money or defend the action. On the 30th April, 1850, the action came on to be tried, and a verdict for the principal, interest, and costs was given for the plaintiffs; and on the 31st May, Croxton paid this amount. On the 25th May, 1850, the company was ordered to be wound up. A claim having been carried in before the Master, by Mr. Croxton, to be repaid the said debt and costs, and also the damages he had sustained in regard thereto, it was on the 22d March, 1851, disallowed. Upon an appeal from the Master's decision, Sir J. L. Knight Bruce, late Vice-Chancellor, on the 1st May, 1851, directed an action to be tried as to Mr. Croxton's right to the principal and interest paid by him, reserving the question as to damages. The action was tried in Michaelmas term last, and a verdict was given in Mr. Croxton's favor. The motion before Sir J. L. Knight Bruce, late Vice-Chancellor, was accordingly now renewed.

*Wigram* and *Hislop Clarke*, for Mr. Croxton, said that as he had succeeded in the action directed to be brought to try his right, he claimed now to be a creditor for the moneys recovered from him in the former action, and for the costs and damages sustained in raising money to pay Hudson.

*Bacon* and *Roxburgh*, for the official manager, contended that Mr. Croxton should not have incurred the expense of defending Hudson's action; and that as, under the 91st section of the Winding-up Act, Mr. Croxton could, upon application to the Master, have had the question between himself and the official manager tried by an action or issue, the costs of the appeal before the Vice-Chancellor had been needlessly incurred, and ought not to be allowed.

*Wigram*, in reply.

SIR J. PARKER, V. C., said that Mr. Croxton was a trustee for this company, and in the character of trustee had borrowed 1,000*l.* on bond, jointly with another party, from Mr. Hudson, and this money not having been repaid, Mr. Hudson had brought an action against them on the bond. Croxton had given notice to the company of the pendency of this action, and required them to defend it. The company, however, left him to defend the action, and the result was, that Hudson had recovered the debt and costs against Croxton. In the winding up, Croxton had made a claim before the Master for this debt against the company, but the Master considered that there was



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no sufficient authority in the company's deed to warrant his thus borrowing the money; and, in order to ascertain the construction of the deed, an action was directed to try whether Croxton was or not authorized to raise the money in question. Croxton had recovered judgment in that action, which proved that the borrowing of the 1,000*l.* was an authorized act done by him as a trustee for the company. His honor said that the rule of the court was, that a trustee ought to be indemnified personally against all the costs of what was done by him for the *cestuis que trust* who appointed him a trustee. Croxton was therefore entitled to be indemnified personally against all costs, charges, and expenses properly incurred by him as a trustee in defence of the claim of Hudson, which had proved to be a claim against the company, and to the costs of the present motion as a successful appeal from the Master, and also his costs before the Master, as well as the money he had paid upon the bond. He could not give him any encouragement as to any claim beyond these costs, but that question was not now properly before him.

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DYKE v. RENDALL.<sup>1</sup>

July 24, 1852.

*Dower, Equitable Bar of.*

Upon the marriage of an adult lady a settlement was made, which was recited to be "for providing a competent jointure and provision of maintenance" for the lady in case she should outlive her intended husband, and for securing a provision for their issue; and it was agreed that the intended husband should give a bond to the trustees of the settlement conditioned for the payment of 2,000*l.* within six months after the marriage, to be held by them upon trust for the husband for life, then for the wife for life, and then for the children of the marriage. The husband duly gave the bond, but only paid a small portion of the 2,000*l.*, and died, having sold real estate of which he was seized during the marriage:—

*Held*, that the settlement was a good equitable bar of dower, and, reversing the decision below, that she was not entitled to a lien upon the estate in respect of the provision that failed.

Equitable bar of dower in this court depends entirely upon the doctrine of contract; and an adult lady may agree to take any consideration or security she pleases, and she takes it with all its defects.

Dictum of Sir A. Hart, in *Power v. Sheil*, 1 Mol. 311, overruled.

THIS was an appeal from a decree of Sir J. L. Knight Bruce, late Vice-Chancellor. The facts of the case were as follows:—By an indenture of settlement made upon the marriage of the plaintiff, then Elizabeth Skinner, with her late husband, T. W. Dyke, and dated the 20th June, 1810, it was recited, that in consideration of the said then intended marriage, and for providing a competent jointure and pro-

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<sup>1</sup> 16 Jur. 939; 21 Law J. Rep. (N. S.) Chanc. 305.

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vision of maintenance for the said Elizabeth Skinner in case she should, after the said intended marriage, survive and outlive the said T. W. Dyke, and for securing a provision for their issue, William Dyke, party thereto, the father of T. W. Dyke, had paid to the said T. W. Dyke the sum of 3,000*l.*; and that John Skinner, the father of Elizabeth Skinner, had paid to the said T. W. Dyke the sum of 851*l.* 10*s.* and thereby covenanted to pay him the further sum of 500*l.*, which two sums of 851*l.* 10*s.* and 500*l.* were the marriage portion of the said Elizabeth Skinner; and that it had been agreed that the said T. W. Dyke should give his bond to trustees therein named, and parties thereto, in the penal sum of 4,000*l.*; conditioned for the payment of 2,000*l.*, with interest at 5*l.* per cent. per annum, within six months from the solemnization of the said intended marriage, to be held by them upon trust for the said T. W. Dyke for life; and from and immediately after the decease of the said T. W. Dyke, then upon trust to pay and apply the interest and profits of the said sum of 2,000*l.* unto the said Elizabeth Skinner (the intended wife of the said T. W. Dyke) and her assigns for and during the term of her natural life; and immediately after the decease of the survivor of them, upon trust for all and every the children of the said intended marriage, as therein mentioned. Elizabeth Skinner was of age at the time she entered into this settlement. T. W. Dyke gave a bond, of even date with the settlement, to the trustees, to secure the payment of the 2,000*l.* Of that 2,000*l.* he never paid to the trustees any part, except a sum of 484*l.* 18*s.* During the marriage T. W. Dyke became seized and entitled in fee simple in possession of certain lands and tenements known by the name of the "Bulford Estate," in the county of Wilts, containing 72*a.* 2*r.* 32*p.* In 1831, he sold and conveyed this property to Richard Cox, but the plaintiff did not thereupon do any act to bar her dower. In December, 1846, T. W. Dyke died, leaving the plaintiff, his widow, him surviving. In January, 1847, Charles Edward Rendall, the defendant, purchased the property from the devisees in trust of the said Richard Cox, who conveyed the estate to him, and he entered into possession of it. The plaintiff now filed her bill, and asked that she might be declared entitled to her dower out of the said Bulford estate, and that it might be assigned to her accordingly. The defendant, by his answer, set out the deed of settlement, and insisted that she had no title or dower out of the premises. The cause first came on before Sir J. Wigram, late Vice-Chancellor, when it was referred to the Master to inquire what settlement was made on the marriage, and whether such settlement, if any, was actually productive of any, and if any, what benefits, in trust for the plaintiff, &c. The Master, by his report, found that the only sums received by the trustees of the settlement was the sum of 500*l.* in liquidation of John Skinner's bond, and the said sum of 484*l.* 18*s.*, part payment of T. W. Dyke's bond for 2,000*l.*, leaving the residue of 1,515*l.* 2*s.* unpaid. Upon the cause coming on for further directions, before Sir J. L. Knight Bruce, late Vice-Chancellor, on the 21st July, 1851, his honor declared that the plaintiff was entitled in respect of her dower to one third of the rents and profits of the Bulford estate, not exceeding for such one

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third of the said rents and profits, 60*l.* 12*s.* per annum, being the interest at 4*l.* per cent. per annum which would have accrued due to her on the sum of 1,515*l.* 2*s.*, the portion of the bond remaining unpaid.<sup>1</sup> From this decree the defendant appealed.

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<sup>1</sup> The reporter has been favored with a note of the Vice-Chancellor's observations during the argument, and his final judgment:—

July 12, 1851. Sir J. L. KNIGHT BRUCE, V. C., during the argument, observed:—If this point were clear of authority, I should have thought the word "jointure," as contained in the settlement, used in its colloquial and familiar sense, in which it means merely a provision for the widow after her husband's death, not including any notion whatever of barring or not barring dower—that this settlement did not bar her dower; but I must consider that Lord Hardwicke was of opinion that the use of the word "jointure," in a settlement before marriage, did, according to the true construction, import a bar of dower. Deferring to his authority, I must come to that conclusion. It is only on account of the weight of his authority that I do so.

At the close of the argument,

Sir J. L. KNIGHT BRUCE, V. C., said—It is quite unnecessary to say how the case would have stood if the husband had not been in default in respect of the payment of the 2,000*l.* at the time when he contracted to sell the real estate in question to the defendant. If he was in default in not paying the 2,000*l.* at the time when he did so contract to sell to the defendant, and the defendant contracted with notice, or at all events completed with notice, of the settlement, he cannot claim to stand in a better condition than the husband, or his devisee or heir; and the contract not having been made good, I am of opinion that the only question is this, whether the wife is to be considered as having a lien upon her dower for that which she ought to have had under the settlement, and has not; or, according to Mr. Parker's latter contention, whether she is not entitled to say that she may be put to her election. The question which I reserve is, whether this is a case of lien or election, upon which I feel some difficulty. Let me have the pleadings, the report, and the decree.

July 21, 1851. Sir J. L. KNIGHT BRUCE, V. C. This case came before me, not originally, but on the general report, confirmed I suppose absolutely, and upon the decree which was pronounced by Sir J. Wigram in 1849. I notice this state of the suit in repeating the confession, that, independently of the decree and of the earlier authority, I should probably have considered the legal title of the plaintiff—a legal title which is perfectly clear—to the dower claimed by her bill not touched or affected in any manner by her marriage settlement, although it contained these words, "for providing a competent jointure and provision of maintenance for the said Elizabeth Skinner." The decree, however, upon the pleadings and the evidence, which was made by Sir J. Wigram, being as it is, and those words being in the settlement, I thought and think myself bound, perhaps by the decree, but certainly by earlier authority, not so to construe the deed, and bound to deal with it as containing a contract between the plaintiff, who was of full age and unmarried when she executed the deed, and Thomas Webb Dyke, who afterwards became her husband, that in consideration of the provisions made for her by him, and by the bond of 2,000*l.*, she would waive and relinquish her dower. Still the contract was not performed on his part; it was broken, if not before he acquired, certainly before he parted with, the real estate in question, which he did not do until a period subsequent to the time appointed for paying the trustees of the settlement 2,000*l.* secured by the bond, of which sum the greater portion still remains unpaid. Could he then, and if he had died seized of the estate, could his heir or devisee have claimed her dower from her, that is, compelled her to release it, or resist in a court of equity a suit by her, without performing his engagement as to the 2,000*l.*, to the extent, at least, of her life interest in that sum? and if not, can the defendant say that he stands in a better position? The defendant, in my opinion, cannot be allowed to say so, for he, and every one intermediate, having a title between him and the husband, must be considered as having acquired the interest with notice actually or constructively of the plaintiff's title. The defendant, however,

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*Greene and Vance*, for the plaintiff, in support of the decree. There was nothing intended by this settlement but the ordinary precaution of making some provision for the husband, the wife, and children; and it cannot be collected from its terms that the wife was to be barred of her dower. The Vice-Chancellor was with us at first upon this point, but upon the case of *Walker v. Walker*, 1 Ves. sen. 54, being cited, he seemed to consider that he was bound to hold that the provision was to be taken in bar of dower. But we submit that the remarks of Lord Hardwicke there are not of importance, for the question did not arise in that case, there being in the settlement the express declaration, that the provision was "for her jointure, and in full bar and recompense of all dower," &c.; it was no decision therefore, upon the mere expression "jointure." To make a provision an equitable bar of dower, you must follow the rules as to a legal bar; and according to the rules of a legal bar, if the dowress be evicted from her jointure, she has a right to resort back to her dower; she is never barred unless the provision intended for her by the settlement be made good. In *Power v. Sheil*, 1 Mol. 296, Sir A. Hart, in effect, decided, that to make a settlement in equity a bar of dower, the provision thereby made should be substantially forthcoming. It cannot be contended by the other side that we are bound to elect, for we have sold our dower, and we have a lien upon the estate for the consideration, exactly as a vendor would have for unpaid purchase-money. The Vice-Chancellor said that he would

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contends, first, that on the ground of the settlement, whatever may have been the husband's conduct, he, or his heir or devisee, would have been, and the defendant is, entitled to resist the plaintiff's demand absolutely and unconditionally; and, secondly, that if not, he is entitled to require her to elect between the settlement and her dower, denying, as he does, that she can, as against him, keep what she has under the settlement, and apply her dower, so far as it will go, or a sufficient part of it, to make good the deficiency. The plaintiff insists, in effect, that she has a lien upon the dower for the full performance, so far at least as her own interest extends, of the antenuptial contract on her husband's part; and it was on this point mainly or solely that my judgment was reserved. I have considered it, and I am of opinion that the plaintiff's view of the question is correct, her case being, if not exactly the same with that of a vendor of land who has purchase-money remaining unpaid, and has a lien for it, and entitled to enforce that lien in equity, yet analogous to it. Reading the settlement as I hold myself obliged to do, it appears to me clear, that it did not leave the husband an option, after the marriage, to refuse to perform, or fail in performing, his part of it, between himself and his wife, upon the terms of placing her in the same situation as if there had been no settlement, or to take or keep from her what, but for the settlement, she would have had, without performing the stipulations on his part, for her benefit, contained in them. If those stipulations had been fulfilled, she could not have claimed any dower, either on the terms of relinquishing her interest in the settlement or otherwise. She, in that event, would have no right of election, no option. To say, then, that in the contrary event she was put to her election, must, I think, be unjust. I repeat, I think she is entitled to assert her legal right, as it is a case of dower, in this court, for the purpose, and to the extent, at least, of making good, so far as by such means she can, on the failure on her husband's part to perform the stipulations for her benefit contained in the marriage contract; and I must deal with this suit accordingly, whether the decree does or does not render it incumbent on me to do so. The form of the order to be made is to be considered. If I am not prohibited by authority from giving the plaintiff an account from the time when, after the husband's death, the defendant first entered into the receipt of the rents, and giving her also the costs of the suit, I shall do so; but this point may be spoken to if his counsel desire it.

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have given us our costs generally, only that the settlement had not been directly stated upon our bill; but it was referentially, and we submit that was sufficient.

[LORD CHANCELLOR. It was the very foundation of your right, and it ought to have been stated upon the bill.]

*Malins* and *Bird*, for the appeal. If the other side be right in their contention, it would be necessary, in all cases of a sale of land by a married man who had jointured his wife, to enter into the inquiry as to the title of the jointure; this has never been customary with conveyances. We submit that the term "jointure" in the settlement is decisive to show that it was to be in bar of dower. *Walker v. Walker*, 1 Ves. sen. 54; *Vizard v. Longdale*, mentioned in *Tinney v. Tinney*, 3 Atk. 8. It has been well settled, that if an adult lady on her marriage accept of a money provision, she is bound by that, and there can be no question afterwards as to the security of that provision. *Simpson v. Gutteridge*, 1 Mad. 609. That case was not cited in *Power v. Sheil*;<sup>1</sup> but Sir A. Hart did not there pretend to decide that an adult lady accepting a provision in lieu of dower was not bound by her contract, but merely that where the assistance of the court was asked against her, where her jointure had failed, the court would not interfere; he decided it merely upon the principle that a party coming for the interference of the court must do equity. It has been often stated that an adult lady may take a mere chance in lieu of her dower.

*Greene*, in reply. I do not deny that an adult lady may take a mere chance; but has she, in the present case, contracted to take this provision as a bar of dower? At the time of the marriage the intended husband was put in possession of certain sums of money, and he entered into a contract to provide 2,000*l.* within six months after the marriage, as a provision for the family; and the trusts are of the fund, not of the bond; the bond was merely the means of providing the fund. In *Vizard v. Longdale*, though the bond was held to be a bar of dower, still the contract was made available; we are therefore entitled to have the interest on the 1,515*l.* 2*s.* made good out of the estate. *Simpson v. Gutteridge* is wholly beside this case; there was no suggestion there that the dowress was evicted from her jointure rent-charge. If the argument of the other side be right, there would be no necessity to look into the title of jointure estates; but it is the practice of conveyancers to do so.

LORD CHANCELLOR, (Lord St. Leonard's). I cannot dispose of this case without further consideration of it. As to *Vizard v. Longdale*, the best report of it will be found in Kelynge's Ch. Cas. 17, where Lord King's observations will be found.<sup>2</sup> In the present case it is

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<sup>1</sup> It was mentioned in the judgment, p. 312.

<sup>2</sup> As text-writers and reporters have assumed that *Vizard v. Longdale* was never reported, it may be as well to give the words of Lord Chancellor King in the report

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expressly stated to be to provide "for competent jointure and provision of maintenance." Therefore, I think it clear that there was here a declaration, on the face of the settlement, that would, in this court, be a clear bar of dower. Whether, in the event that has happened, this is to be a bar or not is a different question; and this is a very peculiar contract. I will first consider the case of the adult female. I have looked at Sir A. Hart's decision in *Power v. Sheil*. I have myself no doubt that an adult lady may bar herself of her dower on any terms or make any condition she pleases. I cannot say that I understand the observation of Sir A. Hart in that case, p. 311 — "I put the case of a contract agreed to by an adult female before marriage, to the effect that the wife never will claim dower, and I asked what a court of equity would do with such a contract as that? Undoubtedly it would say that it only enforces contracts which may be legally entered into, but are deficient in legal form. Now, such a contract as that, the law does not tolerate in any shape." I do not understand that, for I think she may do a very wise thing by enabling her husband to deal with his estates. I have no doubt of such a right where the female is adult. If that be so, the only question is, what has she contracted for?

This settlement seems singularly shaped — the fathers of the intended husband and wife are parties to the settlement, and the intended husband himself provides no money; but the agreement is this — [His lordship here stated the agreement as above set out.] Now, it is apparent that the true consideration for the bar of this lady's dower by the jointure was the actual payment of the 3,000*l.* by the father of the husband; he intended the son's property not to be incumbered by the wife's dower. The parties agreed, in effect, that instead of the trustees retaining 2,000*l.*, part of the 3,000*l.* which was then paid, the whole of the money, nearly 4,000*l.*, should be paid to the husband, he giving his bond to restore to the trustees 2,000*l.* within six months after the marriage. I am much inclined to think that the moment the money was paid, and the condition of giving the bond complied with, the lady could not have claimed dower against the estate of the husband, in consequence of the provision made by the father of the husband. At that time the husband had no real estate, so that the wife had no inchoate right to dower. I confess

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referred to by the Lord Chancellor. The case will be found *sub nomine Vizod v. London, Kelynge*, 17. Lord King said, "Several estates that are not specified in the stat. 27 Hen. 8, c. 10, are yet within the equity of the statute, and the present is not a case within the letter of it; but whenever an estate is settled so as to fall and take effect immediately upon the death of the husband, with a covenant or other instrument declaring it to be as a jointure, or in bar of dower, and is tantamount to its being an actual settlement within the letter of the statute, what is necessary to be done by the words of the statute? The words are expressly 'for the jointure of the wife,' but the statute does not say that the jointure must be, to be expressed in bar of dower. The bar of dower is only a consequence of its being a jointure; and a jointure, according to my Lord Coke, is a provision and maintenance for the wife; and sure this is expressed to be so, and therefore within the description of it. Before the stat. 29 Car. 2, of Frauds, a parol averment of any such provision being made as a jointure was sufficient."

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that my impression is, that she has chosen her remedy by accepting of the bond as the security for the 2,000*l.* There is nothing in *Vizard v. Longdale* against that view of the case, for there is no doubt that the wife was there to have the 14*l.* a year; and if the 2,000*l.* could here be recovered upon the bond, she would be entitled to her life interest in it. But the question is, has she any right, upon the bond failing, to fall back upon the other property? I will give judgment in a few days.

July 27. LORD CHANCELLOR. In this case the Vice-Chancellor decided that the settlement was to be taken in bar of dower; so far, therefore, the decree is right; but there remains another and a very different question to be considered, namely, whether the plaintiff is entitled to any lien upon the estate in respect of this settlement? To decide this question it becomes necessary to consider the difference, as the law stands, between a legal and an equitable bar of dower. *Vernon's case*, 4 Rep. 1, explains how it was that the Statute of Uses, 27 Hen. 8, c. 10, provided for dower. At the time that it was passed, a very great proportion of the lands of this country were vested in feoffees to uses; the consequence was, that as to entitle a wife to dower, the husband must be seized of the land, a great portion of lands were not subject to dower prior to that statute. When, therefore, the statute passed which vested the estate in the person entitled to the use, the wife would have immediately become entitled to dower. The act of parliament, therefore, provided, that where conveyances had been or should be made of any lands, tenements, or hereditaments, to the use of the husband and wife in tail, or to the use of one of them in tail, or for their lives, or the life of the wife for her jointure, every woman married, having such jointure, should not claim nor have any title to dower of the residue of the lands, &c.; and it went further, and it provided that in case the widow should be evicted from her legal jointure, then she should be at liberty to resort back to her dower. That was reasonable enough; so that when the clause of eviction operates, it does so upon the legal jointure, which was made a bar under the statute; that is, the statute makes the bar with an exception. So that, as it appears to me, the clause as to eviction never could operate except where the bar was created by the statute.

How stood the case as to an equitable bar? It was very soon settled, that though there was no bar of the dower under the statute, there might be under the rules of this court; that must be either by analogy to the legal bar, or on the ground of contract; and I am clearly of opinion that the true ground of the equitable bar is that of contract, and wholly independent of the statute. If we were to suppose that this court acted by analogy to the legal bar, of course the bar could only be effectual where it would be so at law, supposing that the provision was converted into a legal estate; but this court has always disregarded the Statute of Uses and the nature of the provision, and has never required any real estate to be settled, but has always considered that personal estate would do as well as real

estate. In *Caruthers v. Caruthers*, 4 Bro. C. C. 500, Lord Alvanley states the rule of the court, that an adult female may take any thing, even a "chance," in bar of her dower — though that chance, as a bar of dower, under the Statute of Uses, would go for nothing. But when this court began to give effect to equitable bars of dower, it not only disregarded the nature of the property, or the *quantum* of it, (for an interest, however slight, if accepted, was just as good as a larger provision,) but it did not consider it necessary that it should be sure to come to the widow. An equitable bar of dower, therefore, as to an adult, has not the qualities necessary for creating a legal bar; every thing depends upon contract; there is no doubt you may bar any possibility; you may deal with your rights in this court, of whatever nature they may be, by contract fairly entered into.

In *Birmingham v. Kirwan*, 2 Sch. & L. 444, Lord Redesdale thought that there was nothing peculiar in the doctrine of this court as to the equitable bar of dower — that it was a mere matter of contract. How stands the case upon the authorities? In *Simpson v. Gutteridge*, Sir T. Plumer said that it was the uniform practice with conveyancers not to question the title of the jointure in cases of equitable bars. I have never met with an instance where it was done, and I should say that it was decidedly not the practice of conveyancers to call for the title to the jointure. If, indeed, it were a jointure purporting to create a legal bar within the statute, it would be different, and the case would stand upon the law as to eviction; but in this court the bar stands simply upon the question of contract. My opinion therefore is, that if an adult lady contracts to accept any given thing in satisfaction of her dower, she must take that thing with all its faults and all its defects; we must look to the contract only; and by no analogy to the legal rule can she, in case of eviction from what she contracted for, come against the lands out of which she might have otherwise been entitled to dower. Of course, this has nothing to do with the performance of the covenant of the husband to give the bond; he must of course, perform it if he desires to keep the estates free from dower; he must do the act contracted for; that depends upon the common doctrine of this court. The question now is, did this lady or not accept of this settlement, such as it is, in bar of dower? The facts are shortly these —

[His lordship here again stated the facts, and after observing that the bond was enforceable like any other bond, continued.]

Now, though, in the events which have happened, the money has not been paid, yet I am clearly of opinion that this lady has no right to resort to the lands acquired by the husband after marriage. I altogether differ from the observations of Sir A. Hart, in the case of *Power v. Sheil*, upon this question; but as the parties may have been misled by that case, I will dismiss the bill without costs.

*Bill dismissed, without costs.*



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*In re The British Alkali Company.*

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*In re THE BRITISH ALKALI COMPANY; and in re THE JOINT-STOCK COMPANIES WINDING-UP ACTS.*<sup>1</sup>

April 24, 1852.

*Joint-stock Companies Winding-up Acts—Discretion of Court as to Winding-up Order.*

Where a company had ceased to carry on business, but the governing body were *bonâ fide* putting in execution their powers, under the deed of settlement, to wind up the affairs of the company, the court refused to make an order under the provisions of the Winding-up Acts, although a creditor of the company to a large amount was in a position to issue execution for his claim against the company, and if not successful by such means, then against the members individually.

THIS was a petition presented by Mr. John Guest, a shareholder in the British Alkali Company, praying that the company might be dissolved, and the affairs thereof wound up, under the provisions of the Winding-up Acts. The company was established in 1835, the capital consisting of 150,000*l.*, in 6,000 shares of 25*l.* each. By the deed of settlement, dated the 10th October, 1835, among other things, provision was made for the dissolution of the company in manner therein mentioned. An act of parliament was afterwards obtained to enable the company to sue and be sued in the name of the secretary, or any one member for the time being of the company. By that act it was provided that execution upon any judgment in any action obtained against the secretary, or any member for the time being of the said company, whether as plaintiff or defendant, might be issued against any member or members for the time being of the said company. At an extraordinary general meeting of the company held on the 10th September, 1843, the capital of the company was increased to 200,000*l.*, by the creation of 2,000 additional shares of 25*l.* each. In 1845 the company ceased to pay any dividends. On the 21st May, 1851, it was resolved to let the works of the company, and to discontinue the business thereof upon the same being so let. At a meeting on the 19th June, 1851, the directors reported that 20,000*l.* should be immediately raised, and called on the shareholders to subscribe that amount. A fund was afterwards subscribed by the shareholders to provide for the necessities of the company.

At a meeting on the 4th October, 1851, at which the formation of this fund was resolved upon, an estimated statement of the position of the company was made, by which it appeared that the assets amounted to 14,118*l.*, and the liabilities (including a debt of 18,526*l.* to Messrs. Glyn) to 37,047*l.* At a meeting on the 19th November, 1851, it was resolved, as early as circumstances would permit, to wind up the affairs of the company. By a judge's order, dated the 15th June, 1850, made in an action brought by Messrs. Glyn against the secretary of the company, it was ordered, that upon payment by

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<sup>1</sup> 16 Jur. 944.

*In re The British Alkali Company.*

the defendant of the costs forthwith, 5,682*l.* 12*s.*, part of the debt, on the 30th October then next; 5,352*l.* 17*s.* 6*d.* on the 30th January, 1851; 3,283*l.* 11*s.* 3*d.* on the 30th April, 1851; 5,224*l.* 7*s.* 8*d.* on the 30th July, 1851; 5,163*l.* 16*s.* 8*d.* on the 30th October, 1851; 3,100*l.* 16*s.* 5*d.* on the 30th January, 1852; and 3,036*l.* 19*s.* 9*d.*, the residue of the debt, on the 30th April, 1852, all further proceedings in the cause should be stayed; but that in case default should be made in any payment as aforesaid, the plaintiffs should be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with costs, &c. Three only of these instalments were paid, and the sum of 15,489*l.* 0*s.* 9*d.* remained due to Messrs. Glyn, who were in a position to enter up judgment on the said order, and issue execution for the said sum. On the 5th January, 1852, a notice was served upon the company, requiring immediate payment or discharge of the said debt, but they had not secured or compounded for the same. From the affidavits filed in opposition to the petition, it appeared that arrangements had been made with Messrs. Glyn, by which their debt had been agreed to be deferred under certain terms, and that the company's works had been let for twenty-one years, at a rent of 2,500*l.* per annum.

*Malins* and *De Gex*, for the petition, said that if Messrs. Glyn could not execute their final judgment against the assets of the company, they might take out execution against the individual members of the company; that the deed of settlement of the company contained no power to lease the works, which the court alone would be able to do; and that all the circumstances of the case were such as to bring it within the act. They cited *In re The Sherwood Loan Company*, 1 Sim., (N. S.) 165; s. c. 3 Eng. Rep. 151, and *In re The Pennant and Craigwen Consolidated Lead Mining Company*, 15 Jur. 1193, s. c. 8 Eng. Rep. 150.

*Daniel* and *Speed*, contra, and

*Terrell*, for the Droitwich Salt Company, were not heard.

Sir J. PARKER, V. C., said that he thought the application of the Winding-up Act, and making the order, were matters in the discretion of the court. It did not follow, that because there were ingredients in the case which gave the court jurisdiction to make the order, the court would therefore make it. That appeared from the judgment of Lord Cottenham in the case of *The Wheal Lovell Mining Company*, 1 Mac. & G. 1. The question, he said, in effect, was, not whether it was a case in which the court had jurisdiction, but whether the circumstances were such as to induce the court, having jurisdiction, to exercise its discretion. Here the case was one in which the company had ceased to carry on business; it had ceased to pay dividends; and all parties agreed that the company was to be put an end to. His honor said that the state of the assets appeared to be this — that the debts of the company amounted to 37,047*l.*, and the assets

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Westby v. Westby.

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amounted to 14,118*l.* not including the works, which were let for 2,500*l.* a year; so that it was plain that upon a very moderate valuation of the works, there would be enough to pay the debts and leave a surplus. His honor said, that if the petitioner came to the court with any case showing that he was pressed by any of the creditors, and asking protection against any pressing demand, the court would consider what was necessary to be done in that position of affairs. His honor did not find that such was the case here. Messrs. Glyn were creditors, and they seemed to consider that there was sufficient property to meet the claims on the company, and they were engaged in negotiating how their claim was to be satisfied. This was a state of affairs which might give rise to a difference of opinion as to the mode in which the company ought to be wound up. Mr. Malins's client thought it should be done under the Winding-up Acts. On the other side, the great majority of the shareholders considered that as they had been doing all they could to wind up the company without the intervention of this court, they would be able to do so, and there might be some surplus remaining for the shareholders. What might be the result under the Winding-up Acts if this petition were to be granted, and these acts to be applied, against the wish of the shareholders, his honor observed that no one could tell. It was a very different case where there was insolvency, or pressing demands against the shareholders, which would result in actions against them speedily; or where there were liabilities to be enforced *inter se*, which could not so well be determined otherwise. His honor said that he did not think he should be exercising a sound discretion in making the order. The company had ceased to carry on business, and the governing body were *bonâ fide* putting into execution their powers, under the deed of settlement, to enable them to wind up the company under the deed, and his honor said that he saw nothing to show him that they might not succeed. His honor, therefore, thought that there must be no order on this petition.

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WESTBY v. WESTBY.<sup>1</sup>

April 29, 1852.

*Practice — Charging Order for Costs.*

By an order in the cause, the petition of Mary Westby, one of the defendants, was ordered to stand dismissed, with costs, to be taxed by the Taxing Master, and to be paid by the defendant to the plaintiffs in the suit. The costs were accordingly afterwards taxed at the sum of 14*l.* 16*s.*, in which was included the sum of 1*l.* 2*s.* 6*d.* for the *subpoena* for the recovery of such costs, which was to be deducted

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Stead v. Banks.

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if they should be paid without *subpœna*, in which case the costs would amount to 12*l.* 19*s.* only. The defendant, Mary Westby was then and had ever since been in Paris, out of the jurisdiction, and the *subpœna* could not be served upon her. A writ of *fi. fa.* was issued against her, but it could not be executed, because no goods of Mary Westby could be found in this country. By an order, dated the 31st May, 1849, a commission of sequestration was ordered to issue against Mary Westby. By another order, dated the 23d June, 1850, the sequestrators were to be at liberty to pay into court, to "the sequestration account," a sum of 49*l.* 16*s.*, received by them under the sequestration, which sum of money they paid in accordingly. By another order in the same cause, dated the 24th February, 1852, the sequestrators were to pay to the same account a further sum of 25*l.* 6*s.* 8*d.*, and both sums were ordered to be invested in trust to the like account. These sums were invested accordingly in the purchase of 127*l.* 4*s.* 4*d.*, 3*l.* per cent. annuities. A petition was now presented by the plaintiffs in the cause, praying that the said sum of 127*l.* 4*s.* 4*d.*, 3*l.* per cent. annuities, might stand charged with the payment to them or their solicitor of the sum of 12*l.* 19*s.*, with interest at 4*l.* per cent. from the 6th March, 1848, together with the costs of the *subpœna* and *fi. fa.*, and the costs of and incident to the petition, unless the defendant Mary Westby, within seven days after service of the order to be made on the petition, should show cause to the contrary, and for substituted service of such order on the solicitor of the said Mary Westby.

*Schomberg*, for the petition, cited *Stanley v. Bond*, 7 Beav. 386.

Sir J. PARKER, V. C., made the order as prayed, as in the cited case, unless the defendant should show cause against it within one calendar month from the service of the order.

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STEAD v. BANKS.<sup>1</sup>

May 5, 1852.

*Foreclosure — Practice.*

Decree against mortgagor and subsequent judgment creditors, fixing one time for them all to redeem.

THIS was an ordinary claim for foreclosure by a first mortgagee of lands against the mortgagor, two subsequent mortgagees, and three judgment creditors.

*Bazalgette* for the plaintiff, asked for an immediate decree of fore-

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*Parkin v. Thorold.*

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closure against the first and second mortgagees on their consent, and the common decree against the mortgagor and the judgment creditors together; the decree against the mortgagor to be immediate, if he consented, instead of fixing successive periods for the judgment creditors to redeem.

*L. Field*, for the two mortgagees, consented to an immediate decree.

Sir J. PARKER, V. C., said that he thought the decree might be made as asked; the only possible inconvenience would be, if more than one of the incumbrancers were to go to the Rolls-yard on the day named, prepared with money to redeem; but if that should happen, he thought the court, on application, would set it right. His honor said that he thought the judgment creditors ought not to stand quite in the position of parties who had advanced money on the security of the property.

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PARKIN v. THOROLD.<sup>1</sup>

April 13, and May 25, 1852.

*Specific Performance—Vendor and Purchaser—Revocation.*

A purchase was to be completed on the 25th October. Before that time the purchaser gave notice, that unless the title was completed by the 5th November, he would abandon his contract. The title was not completed till the 8th January following, and the purchaser accordingly revoked the contract. Specific performance nevertheless decreed against him.

THIS was a suit for specific performance, brought by the vendor to enforce a contract for the purchase of an estate in Devonshire. The agreement was dated the 22d July, 1850; and by the fifth condition of sale, which was incorporated with the agreement, it was stipulated that the purchase should be completed and the residue of the purchase-money paid by the 25th October. The seventh condition provided, that if, through the default of the purchaser, the purchase should not be completed on the day specified, he should pay interest on the residue of the purchase-money at the rate of 5*l.* per cent. The abstract was delivered on the 1st August, and no difficulty of importance occurred in making out the title, except with regard to a deed of settlement, dated in September, 1804, which was imperfectly abstracted, and which the vendor was unable to produce. After some correspondence, in the course of which the vendor's solicitor sent the purchaser a copy of the deed, and informed him that he only required time to be able to find the original, the purchaser's solicitor, on the 21st October, gave notice that he should rescind the contract unless the settlement was produced and the other requisitions on the abstract

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<sup>1</sup> 16 Jur. 959.

*Parkin v. Thorold.*

made good by the fifth November. The vendor not being able to comply with this, the purchaser, on the 7th November, gave notice that he revoked the contract, and demanded a return of the deposit. On the 8th November the vendor's solicitor informed the purchaser that the settlement was found, and on the 6th January in the following year he wrote to say that he was in a position to produce it, at the convenience of the purchaser. The purchaser, however, insisted on the revocation of the contract, and on the 28th February brought an action for a return of the deposit. The bill was filed on the following day, and an injunction obtained to stay the trial. The injunction, however, was dissolved by Lord Cranworth, V. C., on the ground that time was originally an essential part of the contract, and that the defendant had never abandoned his right to insist on the completion on the specified day. See the case reported 2 Sim. (N. s.) 1; s. c. 11 Eng. Rep. 275. The cause now came on for hearing.

*J. Stuart* and *Terrell*, for the plaintiffs, argued that time was not originally of the essence of the contract; and that if it were, it had been waived by the notice given by the defendant. A court of law is not the proper tribunal for trying a case of this nature. At law time is always an essential part of the contract; and Lord Cranworth seems to have assumed that it is so also in equity. But that is not the case, unless some injury would result to the parties from delay. It is true that time may be made essential by a subsequent agreement between the parties; but there is no proof in this case of any such agreement. It may also be contended that the terms of the notice had been complied with, for a good title had been shown, though the copy of the deed had not been verified.

[Sir J. ROMILLY, M. R., said that the verification of the abstract was the completion of the title, not the mere delivery. In that case the copy of the deed which was sent subsequently, was in the nature of a supplemental abstract.]

*R. Palmer* and *Speed*, for the defendant. The mode of construing an agreement is the same in equity as at law. Time is always a part of the contract, but in equity it is regarded as a subordinate part only, and the court will judge from the conduct of the parties whether their intention was to waive it. *Seton v. Slade*, 7 Ves. 265. Even where this part of the contract had been originally waived, it can be made essential by either of the parties giving reasonable notice. *Walker v. Jeffreys*, 1 Hare, 341; *Southcomb v. The Bishop of Exeter*, 6 Hare, 213. This was done in the present case, and the notice was acquiesced in. Sugd. V. & P. 304, 13th ed.

[The following cases were also cited:—*Lloyd v. Collett*, 4 Bro. C. C. 469; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homfray*, 5 Ves. 818; *Alley v. Deschamps*, 13 Ves. 225; and *Watson v. Reid*, 1 Russ. & M. 236.]

*J. Stuart*, in reply, referred to *Radcliffe v. Warrington*, 13 Ves. 323.

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Sir J. ROMILLY, M. R., after stating the object of the suit, observed, that the facts which were now before him were the same as those which came under Lord Cranworth's consideration, the only difference being that the cause had now come to the hearing. He considered himself, therefore, bound by Lord Cranworth's decision, unless that decision should seem to him contrary to the rules of equity. It was with regret that he felt compelled to come to a different conclusion from his lordship. His honor then referred to the fifth and seventh conditions of sale, and to the letter of the 21st October, 1850, and proceeded to say that the case resolved itself into three questions—first, whether time was originally of the essence of the contract, (for if it was, it was clear that the strict terms of the agreement had not been complied with); and if so, whether that particular part of the contract was waived; secondly, whether, though time was not originally of the essence of the contract, it was made so by the letter of the 21st October, 1850; and, thirdly, whether the plaintiffs, by acquiescence, laches, or otherwise, had precluded themselves from enforcing specific performance of the agreement. As to the first point, it was clear that at law the specified time is an essential part of the contract; but this is not the doctrine of equity, and it is only so held in cases of direct stipulation or of necessary implication, as where the property is of a perishable nature, or is wanted for some immediate purpose of trade or manufacture, or where the vendor has a determinable interest only. It had been argued, that in the later decisions this distinction between law and equity had not been recognized; that contracts ought to be construed by the same rule in all the courts; and that if a court of equity rejected one term of a contract, it would enforce a different agreement to that which the parties had signed. Now, it was true that equity puts the same construction on contracts as law; but, on the other hand, equity makes a distinction between matter of substance and matter of form, and prevents a party from insisting on the form in such a way as to injure the substance of the agreement. The jurisdiction of equity in these cases is discretionary, and relief is refused where the enforcing of the contract would produce injustice, as in the late case of *Webb v. The Direct London and Portsmouth Railway Company*, 15 Jur. 697; s. c. 5 Eng. Rep. 151, and in cases where the vendor's title is doubtful. In like manner the court considers whether either party would be injured by delay, and if not, it would not enforce that part of the contract which related to time, but would consider it as merely subsidiary to the rest of the agreement.

On a similar principle the law of equities of redemption was based, where the court treated the substance of the contract as a security for money, and the conveyance of the estate to the mortgagee as merely instrumental in carrying that purpose into effect. In this respect there had been no alteration in the doctrine of the courts of equity. Now, in the present case time was not made in express terms of the essence of the contract; the stipulation was nearly the same as the usual condition of sale. Nor were there any special circumstances which would induce the court to depart from its usual

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*Parkin v. Thorold.*

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course ; the property was not perishable, nor the interest of the vendor determinable, nor was it intended to carry on any trade on the premises. He was also of opinion, though it was unnecessary to decide the point, that if time had been an essential part of the contract, it was waived by the defendant's letter of the 21st October. What the defendant's motives were in writing that letter was of little consequence, though he did not think it was correct to say (as seemed to have been supposed by Lord Cranworth) that it was written at the request of the vendor. Nor could it be said that it was merely a conditional waiver, for the vendor did not agree to the substitution of any other day, and without his acquiescence no fresh day could be imported into the contract. The second question was, whether the letter specifying the 5th November made time of the essence of the contract, though it was not so before. No doubt it was the rule of equity, that either party might make time an essential condition, in cases where it was not so originally, by giving reasonable notice ; *Southcomb v. The Bishop of Exeter* ; *Walker v. Jeffreys* ; but the question here was, whether the time specified in the notice was reasonable. He did not think that sufficient time had been given. The letter was written pending the discussion as to the production of the settlement. The defendant knew the contents of the deed, for he had seen a copy ; and there were many other things to be done, such as the preparation of the conveyance, before the purchase could be fairly expected to be completed. But it had been said, in the third place, that the plaintiffs had acquiesced in the abandonment of the contract ; and the case of *Watson v. Reid* was referred to, which established the doctrine, that if one party gives notice to revoke, and the other does not insist on the contract within a reasonable time, he will be considered to have acquiesced in the revocation ; and modern decisions have tended to reduce the time which will be considered reasonable. But here there was no acquiescence, either express or implied. An examination of the correspondence, and a comparison of the dates, showed clearly that the plaintiffs always insisted on the contract, and that they were engaged, during the whole of the time which elapsed after the receipt of the notice, in endeavoring to procure the deed for the purchaser's inspection. On the whole, therefore, he thought that time was not in this case of the essence of the contract ; that if it had been it would have been waived ; that the time specified by the notice of revocation was not reasonable or sufficient ; and that there were no facts to show that the plaintiffs had acquiesced or been guilty of laches. The usual decree for specific performance must be made, and the defendant must pay the costs, so far as they have been rendered necessary by his resistance.



O'Brien v. Osborn.

O'BRIEN v. OSBORN.<sup>1</sup>

July 13, 21 and 22, and Aug. 2, 1852.

*Creditors' Deed—Covenant not to sue a Debtor—Usury—Release by Creditors.*

By a creditors' deed, dated the 1st July, 1823, it was declared that certain life-estates, which had been previously conveyed to trustees, and certain policies should be held upon trusts, which were generally as follows:—The annual proceeds of the life-estates to be employed in keeping up the policies and paying certain interest, and then the balance was to be employed in paying off the principal of the debts enumerated in the first schedule to the deed, ratably, year by year. The moneys to be received under the policies, and the surplus (if any) of the annual proceeds of the life-estates, were to be employed in paying off the debts in schedule (2), and the surplus was to go to the debtor, Sir J. O. All the creditors were, if required, to make out their claims to the satisfaction of the trustees. The plaintiff was the personal representative of one of the creditors in the second schedule. The deed contained a proviso, the gist of which was, that in consideration of the arrangement thus made, Sir J. O. might remain in England without molestation. A suit of *O. v. K.* was, in 1847, instituted by the present plaintiff for carrying out the trusts of the deed and payment of the creditors, and afterwards, in 1849, the present suit for further carrying out the same purposes, by praying the usual administration accounts against Sir J. O.'s estate. Various arrangements had been attempted in 1850 and 1851, and on the 11th July, 1851, both the causes of *O. v. K.* and *O. v. O.* were brought on together by arrangement. The suit of *O. v. K.* was by consent dismissed, and the costs provided for; and in the present suit an order was made for an account of what was due to the plaintiff from the estate of Sir J. O., and the usual administration accounts. The Master reported nothing to be due from the estate of Sir J. O. to the plaintiff. The plaintiff took exceptions to this report, and also presented a petition of rehearing:—

*Held*, first, that the debt for which the plaintiff claimed was on the whole sufficiently established.

Secondly, that the creditors' deed, allowing Sir J. O. to reside in England, without suit, molestation, &c., did not operate as a release to Sir J. O.

Thirdly, that the suit of *O. v. K.* for carrying out the trusts of the creditors' deed, did not operate as a forfeiture under the covenant not to sue.

Fourthly, that the covenant not to sue prevented the Statute of Limitations from running during the life of Sir J. O.

The bonuses of the policies were to come to the creditors, and not to go to Sir J. O.:—

*Seem*, that this was not usurious.

THE bill in this case was filed on the 20th August, 1849, by Mrs. O'Brien, as the executrix of her late husband, William Neale, on behalf of herself and all others the creditors of the late Sir John Osborn, against Lady Osborn, his widow and executrix. The bill stated that in 1823, the late Sir John Osborn, being indebted to the said William Neale in the sum of 1,353*l.* 8*s.* and interest due on several promissory notes, and to divers other persons, executed a declaration of trust for payment of his creditors, dated the 1st July, 1823, whereby the rents and profits and proceeds of Sir John's Bedfordshire estates were conveyed to trustees for making such payment; the whole debt, principal and interest, due to William Neale being in that indenture stated at 1,483*l.* 2*s.* 10*d.* William Neale died in 1836. The plaintiff had insti-

tuted another suit, (*O'Brien v. Lord Kenyon*), for the purpose of carrying out the trusts of the indenture of July, 1823. The present bill prayed to have an account taken of what was due to the plaintiff in respect of the debt and interest, and of all other debts due from the late Sir John Osborn at the time of his decease, and for the usual accounts of his personal estate.

The indenture of the 1st July, 1823, was made between Sir John of the first part, George Lord Kenyon and Thomas Metcalfe (the trustees) of the second part, and the creditors whose names appeared in the schedule thereto of the third part; and recited that meetings of Sir John's creditors had been held, and that it had been resolved that the whole of the clear surplus income of the trust estates vested in the said trustees by a previous indenture of the 9th April, 1822, "should be rendered available for the benefit of his said creditors in manner thereafter expressed, and that in consideration of the provision so to be made for payment of the said debts with interest, the said creditors should grant to the said Sir John Osborn such license and immunity from suit and molestation as thereafter was expressed." And after reciting that the amount of the several debts then claimed to be due and owing from the said Sir John Osborn to the several persons parties hereto was set opposite to their respective names in the first column of the two several schedules thereunder written; and so much of the same debts respectively as was due for arrears of interest on such debts respectively up to the day of the date thereof was specified in the second column, but which arrears of interest were, for all purposes of the trusts therein contained, to be considered as principal; and the several securities held by the said several creditors respectively, for securing their respective debts, were specified in the third column, it was declared that the said trustees (Lord Kenyon and Metcalfe) should hold all the lands and hereditaments there described for all the estate and interest of the said Sir John Osborn, upon trust, first, to pay the expenses of the trust; secondly, to pay certain specified annual charges; and then to pay the clear residue of the said rents and profits, after the payments aforesaid, and to divide the same into two shares, bearing to each other the same proportion as the aggregate amounts of the debts comprised in the said first and second schedules respectively, "when those aggregate amounts should have been adjusted and ascertained as thereafter mentioned, and should pay and divide the share which should be proportionate to the debts comprised in the said first schedule to and amongst the creditors in the same schedule, in proportion to the amount of their respective debts set after their respective names in the same schedule, after the same shall have been so adjusted or ascertained as aforesaid;" and with the share proportionate to the amount of the second schedule, or so much as was necessary, should effect and keep on foot the policies therein mentioned on the life of Sir John; and as to the residue of that share not required for keeping up the said policies, nor for payment of the interest or debts comprised in the said second schedule, it was, together with the moneys received under the policies, to be held in trust, after all expenses, &c., paid, to divide the moneys which should be received

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in respect of them among the creditors named in the said second schedule, ratably to the amount of their respective debts set opposite to their respective names, after the same should be so ascertained and adjusted as aforesaid. The surplus, if any, of the estates was to be for Sir John, his executors, administrators, and assigns, for his own use and benefit.

Then there came a clause which provided, that no creditor should be entitled to any benefit under the trusts thereof until he should, if thereunto required by the trustees, prove the amount of his debt, by affidavit or otherwise, to the reasonable satisfaction of the trustees, who were to be at liberty to admit the whole or any part of the debt on such evidence as they should think fit. At the close of the indenture was a clause which was much relied upon in argument as a bar and forfeiture of the right, if any, of the plaintiff to sue, which was as follows: — "And this indenture further witnesseth, that in consideration of the provision hereby made for the payment of the said debts of the said Sir John Osborn, with interest as aforesaid, and the covenants and agreements on his part contained in the said recited indenture of the 9th April, 1822, the said several persons parties hereto (other than Sir John) do, and every of them doth, hereby give and grant to the said Sir John Osborn, that in case he shall duly observe and perform the several covenants and agreements on his part contained in the last-mentioned indenture, and in all respects duly conform to the true intent and meaning thereof, and of these presents, it shall be lawful for the said Sir John Osborn to live and reside, and to attend to, follow, and negotiate his affairs and business, in any place and in any manner in which he shall think proper, without any let, suit, trouble, arrest, attachment, or other molestation or impediment whatsoever, to be done, or offered or attempted or procured to be done, to the said Sir John Osborn, in his person or in his goods, chattels, and effects, by the said several persons parties hereto, or any of them, or their partners, executors, administrators, or assigns, &c. And also, that in case any of the said several persons parties hereto, or his partner, executors, administrators, or assigns, &c., shall sue, arrest, &c., the said Sir John Osborn, contrary to the true intent and meaning of the license hereinbefore contained, then his, her, or their debt or debts shall be considered as discharged, and the said Sir John Osborn shall be wholly released, &c.; and these presents shall be pleaded in bar of any suit to recover such debt, &c., and such person or persons shall be excluded from all benefit and advantage under these presents."

By an indenture, bearing date the 1st June, 1850, certain arrangements were made and terms agreed upon by and between the several parties to the trust deed other than the plaintiff, (who declined to concur therein), and the defendant, the Earl of Westmoreland, (who was then abroad). It recited that parts of the trust moneys therein mentioned had been duly distributed among the parties thereto of the first part, and that three sums of 4,160*l.* 8*s.* 6*d.* consols, 6,986*l.* 6*s.* 8*d.* consols, and 101*l.* 15*s.* 9*d.* cash, were standing in the names of trustees, and were the only funds which had not been duly distributed; and it was agreed and declared that the said trustees and other parties might

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at any time effect an amicable adjustment, in respect of all the said several matters, with the said Emma Eliza O'Brien and the said Earl of Westmoreland, or either of them upon such terms as should be approved of by the majority in value of the said parties thereto of the first part, (i. e. the scheduled creditors), their executors, administrators or assigns.

Negotiations were entered into for an adjustment of the matters aforesaid, and with a view thereto both the said causes of *O'Brien v. Osborn* and *O'Brien v. Lord Kenyon*, came on for hearing together before Sir J. L. Knight Bruce, V. C., on the 11th July, 1851, and an order of that date was made by consent of the plaintiff in the suit of *O'Brien v. Lord Kenyon*, dismissing the suit, with costs, against some of the defendants, and making provision for payment of the whole of the costs of that suit; and in the present suit an order was made at the same time for an account of what was due to the plaintiff for her said debt, and for the usual accounts in an administration suit. The Master, upon the reference thus directed, came to the conclusion that nothing was due to the plaintiff, as executrix of her husband, from the estate of Sir John Osborn. To this report the plaintiff excepted. Immediately after the order of the 11th July, 1851, but before the Master made his report, an indenture, dated the 8th August, 1851, was executed by the plaintiff, by Lady Osborn, and by the trustees, reciting the indenture of the 1st June, 1850, and the proceedings since that date, by which an amicable arrangement was agreed upon on the following terms, namely, first, that out of the said trust funds there should be paid to the said plaintiff, Emma Eliza O'Brien, 1,000*l.* 5*s.* 2*d.* consols and 45*l.* cash, and to the said Earl of Westmoreland the sum of 404*l.* 13*s.* 4*d.* consols and 18*l.* 4*s.* 1*d.* cash, it being thereby admitted that the said Emma Eliza O'Brien and the said Earl of Westmoreland would thereby severally receive a dividend on the amounts due to them respectively, proportionate to the dividend therefore received under the said indenture of the 1st June, 1850, by the said parties thereto respectively; and then, after provision for certain costs, it was declared that the said trustees, after making the transfers and payments aforesaid, should divide the residue of the said trust funds among the several persons parties of the first part to the said indenture of the 1st June, 1850, and the said Emma Eliza O'Brien and the said Earl of Westmoreland, ratably and in proportion to their respective debts appearing by the second schedule of the said deed of the 1st July, 1823, to be owing to them; and that all and every the parties receiving the amount so to be apportioned to them respectively should release the said George Lord Kenyon and Thomas Metcalfe from the trusts of the said indenture of the 1st July, 1823, and of the indenture therein recited, and of the said indenture of the 1st June, 1850, and from all claims and demands under or in respect thereof, or either of them.

July 13. The case came on to be heard on the exceptions, but the Vice-Chancellor was of opinion that they must stand over, in order that a petition of rehearing might be presented in the meantime.

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*Hare* and *Hannen*, for the exceptions.

*Lewin*, for the defendant, Lady Osborn.

July 21. *Hare* resumed his argument, stating the case. He reviewed the different grounds of defence that had been set up. First, that there was no evidence of the debt, whereas the plaintiff relied on the promissory note of Sir John, and the admissions and recitals in the deeds of 1822 and 1823; on the admission of the debt by Sir John in his answer in the suit of *O'Brien v. Lord Kenyon*, and the agreements and transactions in 1851. Secondly, that the deed of 1823 operated as a release, whereas the plaintiff contended that such was not the effect of the deed. See the judgment in *O'Brien v. Kenyon*, 6 Exch. 400. Thirdly, that the plaintiff was bound not to molest Sir John, but the plaintiff maintained that this was only during the life of Sir John, and did not extend to protect his estate from suit. Fourthly, the plaintiff contended that he was not bound by the Statute of Limitations, for the contract was such as evidently kept the statute open; moreover, the minutes of the agreements, or attempts at compromise, showed the existence of the debt sufficiently. And fifthly, that his claim had never been satisfied.

*Hannen* (with *Hare*) cited, as to the release, *Wms. Exors.* 1464, and 2 W. Bl. 856. As to molestation from suit—*Cardell v. Edwards*, 1 Show. 46; *Y. B.* 27 Hen. 8, 16, there cited, and *Gibbons v. Rouillon*, 19 Law J. Rep. (N. S.) C. P. 74; s. c. 14 Jur. 66. As to the statute—*Chit. Contracts*, 708, citing *Pothier*; *Witterheim v. Ladd*, 1 H. Bl. 631; *Irving v. Veitch*, 3 M. & W. 90; and *Hemp v. Garland*, 4 Q. B. 519.

*Lewin*, for Lady Osborn, took the points already mentioned, and maintained the opposite view. He quoted *Ford v. Beech*, 11 Q. B. 852; *Beech v. Ford*, 7 Hare, 208; *Hart v. Prendergast*, 14 M. & W. 741; *Tanner v. Smart*, 6 B. & Cr. 608; *Pott v. Clegg*, 16 M. & W. 321; *Foster v. Dawber*, 20 Law J. Rep. (N. S.) Exch. 385, s. c. 6 Eng. Rep. 496; and *Barnard v. Young*, 17 Ves. 44.

*Hare*, in reply.

Aug. 2. Sir G. TURNER, V. C., (after stating the case). The first argument on the part of the petitioner, Lady Osborn, is, that there is no proof of the debt upon which to ground any decree at all. Now, this is a view in which I cannot agree. Sir John, by the indenture of 1822, conveys certain property to Lord Kenyon and Mr. Metcalfe, with powers to them to make arrangements with his creditors, enumerated in the schedule. Among these appears Mr. Neale's name for the sum of 600*l*. Sir John it must be remembered was a party to this deed. Under the powers thus given to them, Lord Kenyon and Mr. Metcalfe came to an arrangement with the creditors, which is embodied in the indenture of the 1st July, 1823. By that deed, trusts are declared of Sir John's life interest for the payment of debts,

namely, the trustees were to receive the rents, and after payment of all the costs to which they might be put, and certain annual charges and payments, the surplus was to be divided among the creditors named in the first and second schedules to that deed. The creditors named in the first schedule were to take payment out of the rents and profits received, and the creditors named in the second schedule were to take payment out of certain policies of insurance thereby directed to be kept on foot; any surplus rents were to be applied in payment of interest of the debts in the second schedule. In this second schedule William Neale's name appears with two sums of 600*l.* and 753*l.* 8*s.* opposite for principal money, and 57*l.* 10*s.* and 73*l.* 4*s.* 10*d.* as interest due on those sums respectively, it being stated that the 600*l.* is due on a promissory note, and that the 753*l.* is due for coals supplied to Sir John. The deed is particular in declaring that the sums appearing in the schedule are to be paid when the same shall have been adjusted and ascertained; and in the schedule itself the column in which the sums are entered is headed "Amounts claimed."

It was contended, on these grounds, that this indenture has the effect barely of stating claims, and that it does not treat any of the amounts named as recognized debts. It is clear, on the recitals, that the deed treats these merely as debts which are claimed to be due; and the declaration of trust directs the rents and profits to be divided proportionally to the aggregate amounts of the sums in the two several schedules, which shall be ascertained; and there is a proviso that no creditor shall be admitted to any benefit unless he shall prove his debt to the reasonable satisfaction of the trustees. On the deed alone, then, I admit, it might fairly be argued, that the specification of these sums in the schedule did not amount to an admission of a debt of that amount by Sir John, or any of the other parties to the deed, but only that such an amount was claimed. But twenty-five years afterwards a bill is filed for carrying into execution the trusts of that indenture, and the answer of Sir John to that bill admits that the trustees had ascertained these debts. Now, it is said that the trustees were merely Sir John's agents for administering the trusts of the deed, and not for the purpose of binding him by their admissions, or by ascertaining the amount of the debts. I think, however, that that could hardly have been the intention at the time of the execution of the deed; and it is not quite consistent with the clause enabling the trustees to admit any debt, as ascertained upon such evidence as they should think fit. Then there is the letter of Sir John in 1828, in which he mentions being indebted to Mr. Neale in upwards of 1,000*l.*; the amount is not quite accurate, but it is near enough to render it almost a certainty that he referred to these scheduled debts. Then Lady Osborn was a party to and executed the indenture of the 8th August, 1851, (see *ante*,) in which not only the existence of the debt is admitted, but its amount is taken at the sum appearing in the second schedule of the indenture of the 1st July, 1823, and provision is made for its immediate payment.

It was then argued that the deed of the 1st July, 1823, operated as a release of his debt, and this argument was founded on the wording

of the operative part of that deed, by which it is witnessed, that in consideration of the provision thereby made for the payment of the said debts, with interest, and the covenants and agreements on the part of Sir John Osborn therein contained, the said persons, parties thereto of the third part (namely, the creditors) gave and granted to Sir John, that in case he should perform &c. the covenants, &c. to be by him observed and performed, then he, Sir John, might live and reside, and attend to his affairs, in any place he might think proper, without suit, molestation, &c. to be offered &c. to him, in his person or in his goods, chattels, and effects, by any of the other persons parties thereto, or the partner, executor, administrator, or assignee of any of them. And it was argued, that as Sir John had not done any thing by which the plaintiff was prevented from getting the full benefit of that indenture of 1823, that provision operated in effect as a discharge of the debt; Neale having thus agreed, in consideration of the security furnished by the deed, not to take any other steps or proceedings against Sir John or his estate. But the court is bound to put a construction upon the instrument which will not defeat the intention of the parties, and it obviously never was intended that this deed should operate as a release. It is a mere license by the creditors to enable their debtor to live unmolested in this country, in consideration of the trusts and whole intention of the deed being carried out. The main intent was, that the debts in the schedule should, in some way or other, at some future day be paid or satisfied. It is utterly inconsistent with that intention to argue that the deed itself operated as a present discharge and satisfaction.

The third point made was as to the question of forfeiture. It was said that this debt was forfeited in 1847, when this creditor, the present plaintiff, filed a bill in this court for the purpose of carrying into execution the trusts of the indenture of the 1st July, 1823, bringing forward two breaches of trust, namely, the dropping of one of the policies, which formed the fund to which this plaintiff had to look for the discharge of his debt; and, secondly, that some of the debtors, whose names were originally in the second schedule, had been transferred into the first schedule; and it is argued that this proceeding was such a suing or molesting Sir John as to bring the plaintiff within the operation of that ultimate proviso in the deed, declaring that in case of any suing or molestation by any creditor, such creditor shall forfeit his claim. The proviso is in these words:—

[His honor read the proviso, which is sufficiently set out, *ante*.]

Now, this clause does not go so far as the clause immediately preceding it, in which the goods, estate, and effects, as well as the person of Sir John, were protected against any proceedings. Here it is only Sir John himself who is mentioned, and the purport of it evidently is to protect him personally from molestation. This suit was merely for the purpose of enforcing the deed itself—an object which it is impossible to conceive should work a forfeiture of rights under the deed. It never could have been intended that the deed should create a right, and at the same time preclude the parties from protecting themselves in the right so created.

The fourth branch of the argument was that addressed to the ground of usury. It was said, that since by the deed all bonuses which might arise on the policies were directed to be paid, not to Sir John, but to the creditors — an arrangement by which it was possible they might receive more than their whole debts — the deed was bad for usuriousness. With regard to this, I shall only say that the deed has already been taken to the Court of Exchequer for their opinion on this point, and they have decided in favor of the deed. I must, therefore, have a very strong inclination against the deed before deciding against that opinion of a court of law, or even directing a new case; but, so far from that, I agree with them, and do not think the proviso in question affects the legality of the deed. Then it was contended that the amount of the debt was unascertained at the date of the deed; and therefore, if the court gave a fixed and definite meaning to the scheduled debt, and took that as sufficient evidence, without more, and as binding upon Sir John, it would, by such a course, give a force and meaning to the deed which it would not of itself possess; and *Wallwyn v. Coutts*, 3 Mer. 707, and *Garrard v. Lord Lauderdale*, 2 Russ. & M. 453, were cited to show that a creditors' deed of this description is merely voluntary. There are, perhaps, some expressions in the judgment at the hearing of this case which might bear too extensive a meaning. The true meaning, probably, of the deed is, that Sir John leaves it to the trustees to arrange the amounts which might turn out to be due, and is therefore bound by what they have done. The deed would be revocable until an arrangement of the amounts was made; after that arrangement it would be irrevocable. Taking the judgment in this sense, I do not think it is objectionable. Besides, I think the deed might well be supported as a purchase by Sir John of a license to live in England, without exposing himself to molestation, and therefore as being made and entered into for valuable consideration. In that view, it would be irrevocably valid from the time of its execution.

Then it was in the next place urged that the debt was barred by the Statute of Limitations; but I think that bar is removed by the tenor of the deed taken altogether, the license to Sir John to live in England unmolested precluding this suit during his life. Besides, there are Sir John's own letters, clearly referring to this debt, in 1847. But then it was said that the debt, assuming it to have subsisted at the time of the decree, had, in fact, been satisfied since that time. It appears that the Court of Exchequer having determined that the deed was not usurious, the trustees came to an arrangement with all the creditors, except the present plaintiff and Lord Westmoreland, by which their debts were to be paid ratably out of the moneys in the hands of the trustees; and thereupon all the creditors were to release the trustees from the trusts of the indentures of 1823 and 1851, and all claims in respect to them, or either of them. Therefore the question of satisfaction arises, since out of the trust funds the plaintiff was to receive the value of 1,000*l.* consols and 45*l.* cash, and Lord Westmoreland was to receive 404*l.* consols and 18*l.* cash, and receive a ratable dividend out of the residue of the trust fund, proportioned to



their respective debts, as appearing in the second schedule of the deed of 1823; and thereupon they were to release the trustees of all the trusts of those two deeds, and of all claims in respect thereof. This arrangement was accepted and entered into by the present plaintiff and by Lord Westmoreland, who both of them signed the deed carrying it out. Now, what position did the parties occupy at the time of entering into it? The present plaintiff stood in this position, that she had previously released neither the estate nor Sir John. She had, therefore, a double claim; and the deed of 1851 is silent as to any claims against the estate of Sir John, but only speaks as to Sir John himself personally and the trustees; and therefore I think the deed of 1851 releases one part only of this double claim of the plaintiff, namely, her claim against the person of Sir John and against the trustees, but that it does not operate as a release of the estate.

We must, therefore, inquire whether the debt, supposing it to be due, was rightly computed as a debt carrying interest; for if not, if no interest has been due on this debt, then the plaintiff has received from the trust estate the full amount of the debt, as far as the principal goes. The question whether the debt carries interest cannot be denied, as far as regards the trust estate. The deed of 1823, by which that trust estate was created, or under which it has arisen, makes express provision for payment of the interest on this very debt. But the question is, whether the debt carries interest as against the estate of Sir John in the hands of his executrix? And here the intention of the parties may best be gathered from the recitals of the deed of 1823. Referring to them, we find that the arrears of interest up to that date are "for all the purposes of the trusts therein contained," to be considered as principal. This is to be coupled with the letters in 1847, in which he speaks of paying all his creditors principal and interest, and where he says, "I believe the amount due by me to the plaintiff amounts, without interest, to 1,400*l*." This statement, it is true, is, to a certain extent, erroneously computed. The sum of 2,228*l*., which he speaks of, is made up by taking the whole amount, both principal and interest, and then computing interest on the interest as well as on the principal. The creditor has received the sums of 1,000*l*. consols, and 45*l*. cash, under the arrangement of 1851, and that arrangement was for payment of debts out of the proceeds of the policies. But the policies were, under the deed of 1823, only to have been applicable to the payment of the principal moneys due, and not for the payment of interest; and no further interest ought to be computed on this debt. Therefore the claim must be diminished, so far as it is composed of interest on the two sums of 74*l*. 2*s*. 10*d*. and 53*l*., which I think the plaintiff has no right to claim; and as far as goes to the computation of interest on the sums which were paid in 1851, no further interest must be allowed on those sums. Allow the petition of rehearing, disallow the exceptions; costs both of petition and exceptions out of the estate.

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Bonfil v. Purchas; Staines v. Rudlin.

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BONFIL v. PURCHAS.<sup>1</sup>

November 6, 1852.

*New Practice — Revivor.*

THIS was a creditors' suit, in which the plaintiff had died.

*Lewin* now stated this to the court, and moved, on behalf of the executrix of the plaintiff, that the suit might be revived against the defendants.

Sir R. T. KINDERSLEY, V. C., made the order; but, after consulting with the registrar, said there was no occasion to mention these matters to the court; they might be obtained by handing the brief to the registrar, as usual in motions of course.

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STAINES v. RUDLIN.<sup>2</sup>

November 6, 1852.

*New Practice — Foreclosure.*

IN this case a claim had been filed on the 15th July last for a foreclosure, and now came on for hearing.

*Drewry*, for the plaintiffs, asked for a sale, under the 48th section of the Chancery Practice Act, 15 & 16 Vict. c. 86.

*Shebbeare*, for some of the defendants.

The following order was made :— " Take an account of the principal and interest due, and tax the costs of all parties, except the mortgagor; and one month after the judge's clerk shall have made his certificate of the amount, if the principal, interest, and costs shall not be paid, let the estate be sold, and the proceeds of the sale paid into court; with usual directions."

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<sup>1</sup> 16 Jur. 965.

<sup>2</sup> 16 Jur. 965.

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Mildmay v. Methuen.

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MILDMAY v. METHUEN.<sup>1</sup>

November 4 and 8, 1852.

*New Practice — Scientific Evidence — Chambers.*

THE circumstances of this case are fully stated in the judgment.

*Malins* and *Jessel*, for the petition.

*Daniel* and *Beavan*, opposed.

*Prior* also appeared.

Sir R. T. KINDERSLEY, V. C. This case of *Mildmay v. Methuen* is a petition presented by Mr. Holland, an architect, who claims to be a creditor of the late Lord Methuen, the suit having been instituted for the administration of the assets, and the usual decree having been made, directing, among other things, that the Master should take an account of debts, &c. Mr. Holland came in as a creditor in the usual way, claiming to be a creditor for 10,000*l.*, stated by him to be what remained unpaid of a larger claim which he said he became entitled to in respect of building, and repairing, or altering some mansion-house. Now, the claim being heard before the Master, the executors controverted the debt; and it became necessary, therefore, in the usual course of things, to prove the debt; and some evidence seems to have been brought in as to some of the items. The Master then, looking into the matter, came to the conclusion that it would be hopeless for him to attempt to decide the question upon all the different items. Being then of opinion that he could not satisfactorily come to a conclusion, for want of that knowledge which an architect or builder must be supposed to possess, he came to the conclusion that the course was to allow it as a claim, but not as a debt; and accordingly he made a separate report, in which he allowed it as a claim. Upon this a motion was made for liberty to bring an action, as the only mode of trying the question, unless the Master would try it; and leave was accordingly given to the creditor to bring the action. That order is still standing; but since it was made, the recent acts of parliament have come into operation relating to the practice of the Court of Chancery; and now the claimant presents this petition, asking to discharge that order, and asking that the matter may be referred back to the Master, and that the Master may be armed with the power of calling in the assistance of a surveyor or builder. The first question is, whether it is competent to the court to make any such order. Upon that question, as it now arises for the first time, I believe, under this act of parliament, I thought it better be-

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<sup>1</sup> 16 Jur. 965.

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 Wilson v. Bennett.
 

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fore coming to a decision, to consult with the other judges; for in all these cases it is reasonable that no separate orders should be made, but that they should all be with the concurrence of the other judges. I am now able to state what is their opinion upon the section in question, the 15 & 16 Vict. c. 80, s. 42. The question is, whether that section confines the power of calling in assistance to the judge himself, or authorizes him either to depute his powers of obtaining assistance to the Master, or himself to refer it to the Master, directing particular scientific persons to be called to the assistance of the Master. We are of opinion that it was not intended by this act that the court should delegate such power to the Master, or arm the Master with such power. The purpose was to enable the judges to do that which they are now enabled to do, instead of the Master; and it was meant that the judges, in executing that function, should have the assistance of scientific persons; therefore, in the form in which the order is prayed for by this petition, I cannot grant it. But a question then remains between these two alternatives, either to leave the matter to go on under the existing law, or to take the matter in chambers under the new act myself, instead of the Master, calling in the assistance of a builder or architect. I have felt considerable doubt which, in the result, would be most convenient to the parties. I have no right to look at my own convenience; as far as that is concerned, I would rather it should go to an action, or have it referred to the Master; but I must consider what I think most likely to give facility to the determination of the question between the creditor and the representatives of the estate. Upon the whole, I think it will be best determined by discharging the order for an action, and taking the matter myself in chambers; that is to say, as to all the details of the bill, which require no discussion, it will be left to my clerks; as to the others, I will determine them myself, availing myself of the assistance of a builder or architect, or such person as I shall think fit. Of questions arising of a grave nature, requiring discussion, I shall consider it right to have them discussed in open court, by counsel. The order made will be to discharge the existing order, and in such form as is proper to be adopted, refer it to the judge in chambers. Let it come to me in chambers. I believe the form will be, to let the petition stand over, and the parties attend me in chambers.

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 WILSON v. BENNETT.<sup>1</sup>

April 27, 1852.

*Delegation of Trust—Will—Construction.*

A testator gave and devised the residue of his real and personal estate to A, B, and C, their heirs, executors, and administrators, upon certain trusts, and empowered his said trustees,

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<sup>1</sup> 16 Jur. 966; 21 Law J. Rep. (N. S.) Chanc. 741.

*Wilson v. Bennett.*

and the survivors and survivor of them, his heirs, executors, or administrators, to sell. The surviving trustee devised the trust estate, and his devisees contracted to sell it:—

*Held*, that there was so much doubt about their having the power to sell, that the court would not compel the purchaser to perform the contract.

NEWMAN HYDE, being seized in fee of certain copyhold messuages and hereditaments of the manor of West Derby, subject, as to part thereof, to the payment of 2s. per annum to the commissioners of West Derby, by his last will, bearing date the 22d February, 1808, after certain specific devises and bequests, not affecting the said copyhold premises, gave and devised all the rest, residue and remainder of his estate and effects, real and personal, copyhold and leasehold, whatsoever and wheresoever, unto Samuel Hyde, John Wilson, and John Leigh, (severally since deceased), to hold to them, their heirs, executors and administrators forever, or for and during all his estate, term, and interest therein upon certain trusts therein mentioned, during the life of the testator's daughter, Mary Dennison, (since deceased); and after her decease, in case, as happened, there should be no child or children of the said Mary Dennison then living, upon certain trusts therein mentioned, as to the said copyhold premises, during the life of Thomas Dennison, (since deceased); and as to all the residue and remainder of his estate and effects, whatsoever and wheresoever, including the said copyhold estate in West Derby, after the decease of the said Thomas Dennison, upon trust to pay, apply, divide, and distribute the same unto and equally amongst such of the children of his the said testator's late nephew, William Martyn Hyde, and of his nieces, Mrs. Holmes, Mrs. Lamb, Mrs. Holt, Mrs. Greenup, and Mrs. Wilson, as should be living at his said daughter's decease, and issue of any of them who might then be dead, share and share alike, as tenants in common, absolutely and forever, such issue to take the part or share only which his, her, or their deceased parent or parents would have taken if living; and the said will then proceeded in the words following:—“And I authorize and empower my said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell and absolutely dispose of all or any part of my said property, at such time and times and in such manner as to them or him shall seem proper, and the purchaser or purchasers thereof shall not be bound to see to the application of the purchase-money, nor be answerable for the misapplication thereof.” The said testator died in the month of February, 1808, leaving the three trustees named in his will, and the said Thomas Dennison and Mary his wife, him surviving. The said John Wilson survived his two co-trustees, Samuel Hyde and John Leigh, and died on the 23d February, 1844, having by his last will, bearing date the 21st April, 1841, appointed Samuel Wilson and Paul Wilson and one John Sparks sole executors thereof, and having also made a codicil to his said will, bearing date the 13th April, 1843, wherein was contained a devise in the words following:—“I devise unto my trustees, Samuel Wilson, Paul Wilson, and John Sparks, their heirs and assigns, all estates and property vested in me under any deed or will as trustee for any other person or persons, to hold the same to them, the said Samuel Wilson, Paul Wilson, and John Sparks, their heirs

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and assigns, upon the same trusts, and for the same ends, intents, and purposes, as I now hold the same."

The said will and codicil of the said John Wilson were duly proved, on the 29th March, 1844, by the said Samuel Wilson and Paul Wilson alone; and by a deed-poll, bearing date the 3d April, 1850, under the seal of the said John Sparks, the said John Sparks renounced probate of the said will and codicil of the said John Wilson, and renounced and disclaimed the trusts, estates, and premises by the same will and codicil given to him. On the 23d August, 1850, the said Samuel Wilson and Paul Wilson entered into an agreement in writing with the defendant, Richard Bennett, whereby they agreed to sell, and the said Richard Bennett agreed to purchase, such parts of the said copyhold hereditaments at West Derby, so devised by the will of the said Newman Hyde, subject to the said annual payment of the said sum of 2s., as in the agreement are particularly mentioned for the price or sum of 1,900*l*. An abstract of the title of the said hereditaments was afterwards furnished to the said Richard Bennett, and he declined to accept the title of the said Samuel Wilson and Paul Wilson to the said copyhold hereditaments so agreed to be purchased by him, upon the grounds, that, under the circumstances hereinbefore stated, the said Samuel Wilson and Paul Wilson could not, nor could either of them, by themselves or himself, make a good title to the said hereditaments; and that the several persons beneficially interested therein under the will of the said Newman Hyde would be necessary parties to any effectual conveyance of the same hereditaments; and that, some of such persons being infants, no such effectual conveyance could then be made. The parties thereupon concurred in submitting these facts to the court in a special case, stating that the said Richard Bennett was willing to accept the title of the said Samuel Wilson and Paul Wilson to the said hereditaments, in case it should appear to the court that the said Samuel Wilson and Paul Wilson, without the concurrence of any other persons, could, under the circumstances aforesaid, make a good title thereto. The question submitted by the case for the opinion of the court was, whether, upon the true construction of the said will of the said Newman Hyde, deceased, and in the events which had happened, and were thereinbefore stated, the said Samuel Wilson and Paul Wilson could, without the concurrence of the several persons then beneficially interested in the said copyhold hereditaments under the trusts of the said will, make to the said defendant, Richard Bennett, a good title to so much of the same hereditaments as were hereinbefore mentioned to have been agreed to be sold by the said plaintiffs to the said defendant, Richard Bennett, subject to the said annual payment of 2s.

*Malins* and *Humphrey*, for the plaintiffs, submitted that a good title could be made by the vendors, notwithstanding *Cooke v. Crawford*, 13 Sim. 91, which was a case where the power was sought to be exercised by a person not contemplated on the creation of it.

[Sir J. PARKER, V. C., said that he thought it was impossible to con-

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Wilson v. Bennett.

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sider that the decision in *Cooke v. Crawford* was, that a trust estate could not be devised in any case.]

They cited also *Bradford v. Belfield*, 2 Sim. 264; *Cole v. Wade*, 16 Ves. 27; and *Titley v. Wolstenholme*, 7 Beav. 425.

*J. Russell, Hardy*, and *Osborne* appeared for the defendant; but without hearing them,

Sir J. PARKER, V. C., said that he thought the title was too doubtful for the court to compel a purchaser to take it. The devise here was to three persons, their heirs, executors, and administrators forever; and then there was a power to the said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell and absolutely dispose of all or any part of the property. It was obvious, his honor remarked, that the testator intended this power, or rather trust, to go with the estate; he had limited the estate to go to the three persons in fee, and he assumed that it would descend to the heirs of the survivor, and then he contemplated a sale by the heir. It was clear that the testator never contemplated such an event as that the estate should go in one direction and the power in another, so that the heir of the survivor should have simply a common-law power of sale. It appeared to his honor, if the surviving trustee had conveyed away the estate in his lifetime, so that other persons should have the estate, which was the only thing enabling the trustees to exercise this trust or power, that upon his death his heir could not exercise the trust. The surviving trustee had devised the estate, which amounted to the same thing. His honor said that *Cooke v. Crawford* stood upon different grounds, namely, that a trust could not be delegated to persons not contemplated in its original creation. In that case there was a devise of a fee simple estate to trustees, upon trust that they, or the survivors or survivor of them, or the heirs of such survivor, should sell, not naming his assigns; and the court held that the trust could not be delegated without express terms authorizing a transmission of it. His honor said that the decision in that case had sometimes been understood as going far beyond what it really imported. There was no doubt that a trustee could devise the trust, but the question in each case was, whether such devise was in accordance with the title under which he held. It might often be the duty of a man, in such circumstances, having the legal estate, to take care of it, to keep it from getting into the hands of a lunatic, or a person out of the jurisdiction.

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*Ex parte* Burton; *In re* The Sea Fire and Life Assurance Company.

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*Ex parte* BURTON; *In re* THE SEA FIRE AND LIFE ASSURANCE COMPANY.<sup>1</sup>

June 1, 1852.

*Contributory.*

An agent of a company, who had accepted shares on which he paid nothing, afterwards begged to relinquish his agency, and to be allowed to give up the shares. His resignation of the agency was accepted, but not of the shares, though he was told that he might nominate some other person to pay upon them. Nothing further having been done:—

*Held*, that he was a contributory.

THIS was a motion to reverse the decision of the Master charged with the winding up of the above-named company, by which he had placed the name of Mr. Charles Burton on the list of contributories in respect of five shares in the company. In July, 1849, Mr. Augustus Collingridge, the secretary, and one of the directors of the company, called on Mr. Charles Burton, an auctioneer, at his place of business in Monmouth, and urged him to become an agent for the company. Upon Burton's assenting, Collingridge stated that he must hold at least five shares of 20s. each in the company. Burton eventually signed a printed paper in two places, the first signature being to an appointment of Collingridge to execute the company's deed of settlement in his name, and the second to a request to be appointed agent. On the 17th August, 1849, Burton wrote to Collingridge a letter, intimating his desire to terminate his connection with the company. On the 19th August, Burton received the following letter from Collingridge:—

"Sea Fire and Life Assurance Society, 31, Cornhill,  
"London; Aug. 18, 1849.

"Sir,—I beg to acknowledge the receipt of your letter of the 17th instant, and the directors accept your resignation to act as agent for the district of Monmouth. I have also to remind you, that the amount of 5*l.* on your five shares was due on Saturday, the 11th instant, of which notice was given. I am now requested to inform you that the directors require that you pay the same on or before the 25th instant.

"I am, sir, your obedient servant,  
"AUGUSTUS COLLINGRIDGE,  
"Managing Director."

Mr. Burton answered as follows:—

"Dixon, August 20, 1849.

"Sir,—In answer to yours of the 18th instant, I trust the directors of the Sea Fire and Life Assurance Society will not insist upon making me a proprietor of shares, which I certainly should never have

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<sup>1</sup> 16 Jur. 967; 21 Law J. Rep. (N. S.) Chanc. 781.



*Ex parte Burton; In re The Sea Fire and Life Assurance Company.*

thought of applying for, but for the circumstance of being very much urged to take the agency for the district of Monmouth. It was merely to comply with the society's regulations upon becoming an agent to them that I applied for them, and when I requested the favor of being exonerated from the agency, I meant the shares also; and as the directors have been pleased to excuse me the one, I hope they will also the other.

"I remain, sir, yours respectfully,  
"CHARLES BURTON."

To this Mr. Collingridge replied:—

"Sea Fire and Life Assurance Society, 31 Cornhill,  
"London, August 31, 1848.

"Sir,—I have to acknowledge the receipt of your letter of the 20th instant, and am requested by the directors to inform you that they cannot, in duty to the shareholders whom they represent, release you from the shares you subscribed for, but to meet your convenience the directors will allow you to nominate another party to pay upon the shares.

"I remain, sir, your obedient servant,  
"AUGUSTUS COLLINGRIDGE,  
"Managing Director."

The deed was not executed by Collingridge until October, and Burton never paid any money in respect of the shares, nor did he nominate any other person to take them.

*Malins*, in support of the motion, contended that the power of attorney was revoked by Burton, and referred to *Rez v. Waite*, 11 Price, 518.

*Daniel* and *Rozburgh*, for the official manager.

*Malins*, in reply.

Sir J. PARKER, V. C., said that he thought the Master had come to a right conclusion. Before the 17th August, Burton had done all that was necessary to render him liable as a contributory. He had agreed to take shares by a formal instrument, which contained a power of attorney to Collingridge to execute the deed for him, and upon that shares were allotted to him, but he paid no deposit. Questions might arise whether power was granted to Collingridge at all to execute the deed, or whether, if so granted, it was countermanded. But his honor thought there was no attempt on the part of Burton to countermand it. In a letter of the 17th August, Burton asked to have the connection put an end to. To this letter he received an answer, which discharged him from being an agent, but reminded him that 5*l.* was due on his five shares. The reply to that was—"I trust the directors will not insist," &c.

[His honor read the letter before given.]

That was a request to be discharged from the liability under which

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Rogers v. Jones.

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he had come, and the answer to it was a refusal. In that answer they said, "in order to meet your convenience the directors will allow you to nominate another party to pay upon the shares." Nothing more seemed to have been done. His silence left the matter where it was. His honor therefore thought that Burton was plainly liable.

*Motion refused, with costs.*

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ROGERS v. JONES.<sup>1</sup>

November 3 and 5, 1852.

*Practice — 15 & 16 Vict. c. 86, s. 44 — Proceeding in Absence of Representative of deceased Defendant.*

After order in an administration claim, dated April, 1852, one of the executors, defendants, who was also residuary legatee, died insolvent, never having proved nor possessed assets. His widow refused to take out administration, and his children could not be found. An order was made, under section 44, on application *ex parte*, that the suit should proceed without making the representative of the deceased executor a party, and that the inquiries before the Master should proceed as though such representative had been served with a writ of summons.

THIS was a claim for administration of the estate of a testator, by one of the residuary legatees, against the two executors, R. Jones and Thomas McKiernin. These executors were also themselves two of the residuary legatees. R. Jones had not proved the will nor possessed any of the assets. The usual decree had been made for administration, dated the 21st April, 1852. (See Orders, April, 1850, Sched. (C.), No. 4). Since the decree, R. Jones had died intestate and insolvent, leaving a widow and four children. The widow refused to take out administration, and it could not be discovered where the children were.

*Bird*, for the plaintiff, applied *ex parte*, under the 44th section of the 15 & 16 Vict. c. 86, for liberty to proceed with the suit without taking out representation to R. Jones.

STUART, V. C., said, that to insure uniformity in construing the act, he would consult with the other judges.

Nov. 5. On the matter being again mentioned,

STUART, V. C., said—As I understand it, the surviving executor has possessed assets, and the deceased executor has not proved nor possessed assets, and he is dead insolvent. I do not think that you

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*Lowes v. Lowes.*

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need bring his representative before the court. The other judges agree in that view, and I have no doubt about it myself.

*Bird* asked that there should be a direction that the inquiries in the Master's office should be prosecuted without the necessity of serving the representative of the defendant, Jones, with the writ of summons, as directed by the decree. He said that an order had been made upon the claim, which was drawn up, and was now about to be prosecuted in the Master's office, and it would be necessary to show that all the living residuary legatees, and the representatives of those who were dead, had been served, or they would be stopped in the Master's office.

STUART, V. C., said that he thought such a direction might properly be part of the order.

Order. Let this suit proceed without making the legal personal representative of the late R. Jones a party thereto; and let the inquiries and accounts directed by the order of the 21st April, 1852, be prosecuted and taken in like manner as if the legal personal representative of the late R. Jones had been served with a writ of summons, and had entered his appearance with the clerk of records and writs as a defendant.

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LOWES v. LOWES.<sup>1</sup>

November 5, 1852.

*Practice—Sect. 52 of Stat. 15 & 16 Vict. c. 86—Revivor by Creditor not Party to Administration Suit.*

Leave given that a creditor, so found by the Master, not a party to the suit for administration, might serve notice of motion for an order to revive, under sect. 52.

*Semble*, such notice was necessary for the analagous motion under the old practice, and is still necessary.

The 52d section applies to abatements which occurred before the act came into operation.

This was a suit by two trustees and executors against the infant heir and the widow of the testator for administration. One of the trustees had since died, and the suit had been revived. In 1848 there was a decree for sale. Afterwards the other trustee died, and his heirs had neglected to revive. One of the defendants, the infant, revived the suit. The infant then died, and all his interest was gone by his death, because there was a gift over if he died before he attained twenty-one. There was therefore no plaintiff; the executors of the original plaintiff were defendants. Nothing had been done

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<sup>1</sup> 16 Jur. 968.

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Cable v. Cooper.

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under the decree for sale. One of the persons found by the Master to be a creditor of the testator, but not a party to the suit, was desirous to have the decree prosecuted.

*Forster*, for the creditor, applied *ex parte*, that he might be at liberty to file a supplemental bill if the representatives of the deceased plaintiff did not revive within a limited time, as in *Dixon v. Wyatt*, 4 Mad. 392.

[STUART, V. C. Why are you not at liberty to do so without leave?]

Because any of the parties might say, "We are entitled to do this; you gave us no notice;" and they would, perhaps, apply to take the bill off the file.

[STUART, V. C. You state a very good reason for my not making such an order in the absence of those parties.]

I should serve them with the order when made.

[STUART, V. C. I think you ought to serve them with notice of this motion.]

Nov. 5. *Forster* applied *ex parte*, under the 52d section of the 15 & 16 Vict. c. 86, for an order to revive, or, if the defendants were to have notice, for leave to serve notice of the motion. He said it had been decided, in another branch of the court, that this section applied to the case of an abatement which had taken place before the statute came into operation.

STUART, V. C. There can be no doubt of that. Take leave to serve notice of the motion.

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CABLE v. COOPER.<sup>1</sup>

November 8, 1852.

*Practice — Evidence under 39th Order of August, 1852, in Suit at Issue before passing of the 15 & 16 Vict. c. 86.*

Where a cause was at issue before the passing of the 15 & 16 Vict. c. 86, upon motion by the plaintiff, with notice, the court ordered that the evidence should be taken under the provisions of that act and the orders of August, 1852, upon being satisfied that it was a case in which *vivâ voce* evidence would be best, and that the defendant had been at one time ready to consent to its being taken under the act, although the defendant opposed.

ROGERS moved that the evidence in this cause might "be taken in the mode prescribed by the act 15 & 16 Vict. c. 86," and the orders of the 7th August, 1852, the notice of motion being in the terms of the latter part of the 39th of these orders. The cause was at issue before the act passed, replication having been filed on the 29th June, and

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<sup>1</sup> 16 Jur. 969.

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Maxwell v. Maxwell.

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the act having passed on the 30th. Shortly after replication, the defendant had filed interrogatories for the examination of witnesses. No witness had been examined on either side, but an early day had been appointed for the examination. The defendant originally consented that the evidence should be taken under the 15 & 16 Vict. c. 86, on payment of the costs which he had incurred in preparing to take evidence. Before that agreement could be reduced into writing, the defendant was served with notice of the present motion.

*Stephen*, for the defendant, admitted that it was a case in which the evidence could be better taken *vidé voce* than by interrogatories, but opposed the present motion, unless the plaintiff would agree to pay him the costs which he had already incurred in preparing evidence.

STUART, V. C. Have not I power to adjourn this till the hearing?

*Rogers*. Yes; but meanwhile the unnecessary expense of interrogatories on either side will have been incurred.

STUART, V. C. The order is clearly imperative that the evidence shall be taken according to the former practice, unless by consent, or unless the court should see good reason for departing from the rule. I think that this is a reasonable application, unless the defendant can satisfy me that what he was about to consent to is now improper. I think the order should be made. The costs must be costs in the cause.

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MAXWELL v. MAXWELL.<sup>1</sup>

November 3 and 4, 1852.

*Construction of Will—Election.*

The testator, domiciled in England, and having real and personal estate in England, and real estate in Scotland, by will, executed and attested in the English form, by virtue of every right, power, or authority enabling him in that behalf, devised and bequeathed all his real and personal estate, whatsoever and wheresoever, upon trusts for the benefit of all his children. The will was inoperative, according to the Scotch law, to pass real estate in Scotland:—

*Held*, that the eldest son and heir, according to the law of Scotland, of the testator was not bound to elect between the real estate in Scotland and the benefits given to him by the will.

THIS was an appeal from the decision of Sir John Romilly, M. R., upon a special case submitted for the opinion of the court under the provisions of the stat. 13 & 14 Vict. c. 35. The statements appearing upon the special case were to the effect following: P. C. Maxwell was, in his lifetime, and at the date of his will, and at the period of

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Maxwell v. Maxwell

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his decease, domiciled in England, and was, at the same respective periods, entitled, under certain Scotch heritable bonds or securities, to one third of 5,000*l.*, one fifth of 16,000*l.*, and one fifth part of 22,000*l.*, which said sums were charged by the said bonds or securities upon real estate in Scotland. The said P. C. Maxwell was also, at the same respective periods seized of real estates in England, and also possessed of personal property invested in the public funds and in other English securities, to an amount exceeding 25,000*l.* P. C. Maxwell, being so entitled and interested and seized and possessed, made his will, bearing date the 27th February, 1851. This will was not in the handwriting of the testator, but was duly made, executed, and attested according to the law of England. It was in the following words: "By virtue of every right, power, or authority enabling me in this behalf, I give, devise, and bequeathe unto and to the use of William Lawson, of Brough Hall, in the county of York, Bart., and Edward Wright, of Richmond, gentleman, their executors, administrators, and assigns, all my real and personal estate, whatsoever and wheresoever, and whether in possession or reversion, upon trust to permit my dear wife, Helena, to receive and take the rents, interest, dividends, and annual profits thereof for the term of her natural life, in full confidence that she will promote, to the best of her power, the education and advancement of my children; and after her decease, in trust for all my children, their heirs, executors, administrators, and assigns, equally, share and share alike, as tenants in common, and not as joint tenants; and I appoint the said William Lawson and Edward Wright executors of this my will." P. C. Maxwell died on the day of the date of his will, leaving the defendant F. H. C. Maxwell, his eldest son, and heir at law in England and in Scotland, and the plaintiffs, his only other children, who, with their brother the defendant, were then, and still remained, all infants. Helena Constable Maxwell, the testator's widow, died in June, 1851. The shares and interest of the testator in the three above-mentioned Scotch heritable securities, or any or either of them, did not pass by his will, and devolved respectively, upon his decease, to, and vested in, the defendant F. H. C. Maxwell, as the heir of the testator.

The reasons which prevented the said shares and interest in the said Scotch heritable bonds from passing by the will of the said testator are the following: First, the said will did not, in the words of devise, contain the word "dispose," which is essential to a valid disposition of real estate in Scotland. Secondly, it had no "testing clause," or clause of attestation, which is also essential to valid disposition of real estate in Scotland, where it is not holograph. The testing clause ought to state the date and place of execution, and the names and descriptions of the writer and witnesses. If the said will had contained the word "dispose" in the devising part thereof, and had such testing clause as aforesaid, the said will would, according to the law of Scotland, have included and been fully sufficient to pass and vest in the trustees therein named, upon the trusts therein declared, the said shares and interests in the said Scotch heritable bonds, but subject to the privilege of the heir at law hereinafter men-

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tioned. The said will having been executed on the death-bed, it would have been competent to the heir at law to set it aside, (even if executed with the word "dispose," and with a proper testing clause,) in so far as it affected heritable property in Scotland. Had the testator been domiciled in Scotland at his death, the said will, having been made in England, in the English form, would have been effectual to pass all his personal estate, although made on the death-bed. The Scotch law of approbate and reprobate, as applicable to such a case as the present, is the same as the English law of election. The circumstance that a settlement or *mortis causâ* disposition of the heritable property in Scotland was executed on the death-bed does not prevent the law of approbate and reprobate being set up against the heir at law, if the personal estate is given to him by the same instrument.

The question submitted by the case for the opinion of the court was, whether the defendant F. H. C. Maxwell was bound to elect between the said shares and interest in the said Scotch heritable securities, (to which the testator was in his lifetime entitled,) and the benefit which the said F. H. C. Maxwell might claim under the said will of the said testator as one of his children; or whether, on the other hand, the said defendant the heir at law was entitled to take the said benefit under the said will, and also to take, as the heir at law of the testator, the said shares and interest in the said heritable bonds. The plaintiffs upon the case were the younger children of the testator by their guardian, appointed by special order of the court, and the defendants were the testator's eldest son by his guardian, similarly appointed, and the trustees of the will. Upon the hearing of the case before the Master of the Rolls, his honor, holding that he was bound by the authority of the cases of *Johnson v. Telford*, 1 Russ. & M. 244; and *Allen v. Anderson*, 5 Hare, 163; 10 Jur. 196, decided that the heir was not put to his election. Against this decision the plaintiffs appealed.

*Anderson and Fleming*, in support of the appeal, argued that the will must be construed according to the law of the country in which it was made, and in which the testator was domiciled. The heir, in coming in to take a benefit under the will, must be considered as contracting to give effect to the intention evidenced by the testator in his will, and in ascertaining that intention the law of domicile could be alone regarded. *Trotter v. Trotter*, 4 Bligh. (n. s.) 502; 3 Wils. & Sh. 407. A knowledge of the law of every country in which the testator might have property could not be imputed to him. Applying that rule to the present case, no doubt could be entertained as to the testator's intention to pass all his real property, wherever situate. *Churchman v. Ireland*, 1 Russ. & M. 250. There were no words, at the date of his will, more effectually calculated to express that intention than the words which the testator had used. The will had failed to pass the Scotch real estate, not from any want of clearness or distinctness in the expressed intention of the testator to pass it, but from the want only of an instrument technically worded, and ex-

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Maxwell v. Maxwell.

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ecuted according to the Scotch law, for the purpose of passing real estate in Scotland. That being so, the heir ought, they submitted, to be put to his election. The following authorities were also referred to and commented upon: *Brodie v. Barry*, 2 V. & B. 127; *Johnson v. Telford* 1 Russ. & M. 244; *Allen v. Anderson*, 5 Hare, 163; 10 Jur. 196; *Ker v. Wauchope*, 1 Bligh. 1; *Gayner v. Cunningham*, Id. 27, note; *Bennett v. Bennett's Trustees*, 7 Sh. & Dunl. 817; *Dundas v. Dundas*, 2 Dow & C. 349; 7 Sh. & Dunl. 241; 4 Wils. & Sh. 460; *M'Call v. M'Call*, Dru. 283; and *Reynolds v. Toren*, 1 Russ. 129.

*Roundell Palmer* and *Bagshawe*, for the defendant the heir at law, argued that the rule of construction adopted by the English law was, that general words of disposition in a will were to be confined to property which the will was calculated or operative to pass; and that there must be a clear and manifest intention appearing on the face of the will to include property not effectually devised by it, before the heir at law could be put to elect. *Trotter v. Trotter*; *Johnson v. Telford*; *Brodie v. Barry*; *Allen v. Anderson*. This was shown by that class of cases in which it was laid down that a general devise of real estate in England is inoperative to pass copyholds not surrendered to the uses of the will. They submitted that no such manifest intention appeared upon the face of the testator's will in this case, and that therefore the heir was not bound to elect between the benefits under the will and the heritable bonds. 2 Roper on Legacies, 1582, was also referred to.

*Anderson*, in reply.

*Witham* appeared for the trustees.

Sir J. L. KNIGHT BRUCE, L. J. In the year 1851, a gentleman connected with Scotland, resident and domiciled in England, having real estate in England, and personal estate in England, and real estate in Scotland, makes his will in the English form. The will, as executed and attested, is incontestably valid according to the English law. By that will, he, "by virtue of every right, power," &c., [his lordship read the will.] The will is incontestably invalid as to the real estate in Scotland, which accordingly descended upon one of the testator's sons, as his heir, according to the law of Scotland. It is against this son, in respect of the Scotch property thus descended, that the question of election in this case is raised. It is said, on the part of the other children of the testator, that the heir must either give up the Scotch property for the purposes of the will, or take not under it, this claim of the younger children being founded on the generality and universality of the language of the will. Here it is agreed that the testator had property, that Scotch real property formed part of his estate, and that the will purports to give all his real estate. I apprehend, however, that according to the principle or rule of construction which the English law applies, if not to all instruments, at least to instruments testamentary, the law is, to interpret them ac-



cording to the principle, that the generality merely, or the universality merely of the gift of property, is not sufficient to demonstrate or create a ground of inference that the giver meant it to extend to property incapable, though his own, of passing by the particular act. If the will mentioned particular property, that would not be the same case as here. If the will had mentioned Scotland in terms, or the testator had not had any real estate except real estate in Scotland, that might have been a ground for putting the heir to his election. The matter, however, standing as it does, we are bound to hold that the will does not exhibit an intention to give or affect any property which it is not adapted to pass. In coming to this conclusion, I suspect we must be doing what the testator himself would disapprove of if he could be heard otherwise than through his will. I wish he could; but I am bound, however I may regret it, to act upon the principle of construction. I referred during the argument to the cases of *Harris v. Ingledew*, 3 P. Wms. 91; *Hastlewood v. Pope*, Id. 325; *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390; and *Wentworth v. Cox*, 6 Mad. 363; and many other authorities were cited at the bar, and others might be referred to, but this would be superfluous. I may be excused, however in reading a few words from the judgment of Tindal, C. J., in the case of *Doe d. Clarke v. Ludlam*, 7 Bing. 279; 5 Moo. & P. 58—"I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship that may sometimes be occasioned by a strict adherence to the rule, than in the confusion that must follow on departing from it."

LORD CRANWORTH, L. J. I need not add any thing beyond the expression of my concurrence both in the conclusion which has been arrived at, and in the regret at being obliged to arrive at it. I take the general rule to be that which was put distinctly by Sir John Leach in *Wentworth v. Cox*, that general words *prima facie* import only that which the nature of the instrument is calculated to pass. An exception to the application of that general rule is, where it is apparent on the face of the will that property beyond that is intended to pass; as where other property is mentioned by name, as in *Brodie v. Barry* and the other cases cited. Here nothing of the sort occurs; and we should be doing what is unwarrantable, if, acting on conjecture merely, we interpreted the will otherwise than according to the general rule.

LORD BARRINGTON v. LIDDELL.<sup>1</sup>

June 26 and 28, and July 12, 1852.

*Thellusson Act—Limit of Accumulation.*

By a marriage settlement, dated 1823, family estates at B. were charged with 40,000*l.*, portions for younger children of Lord B. The portions were to be divided, payable, &c., among the younger children, as Lord B. should by deed or will appoint; and in default of appointment, equally to be divided among them, and payable at the decease of Lord B. There was a power of advancing the whole of the expectant portion of each child to him or her during the lifetime of Lord B., with his consent. By will, dated 1825, the great uncle of Lord B. bequeathed 15,000*l.* to trustees, upon trust to accumulate the same during the life of Lord B. or for such further period as should make up the space of twenty years, in order, by means of the accumulated fund, to exonerate the family estates at B. from the charge of 40,000*l.* This will in many other respects recognized the settlement, and showed a desire to leave the family estates at B. enlarged and unincumbered. The testator died in 1826. In 1847, when the period of twenty-one years after the testator's decease elapsed, the accumulated fund only amounted to 35,000*l.* At the time of instituting this suit it amounted to 43,000*l.* The period of twenty-one years, therefore, mentioned in the 1st section of the Thellusson Act, proved inadequate to effect the intention of the testator:—

*Held*, first, that the trust for accumulation was not within the exception in the 2d section, as being a provision for payment of portions of children of persons taking an interest under such conveyance, devise, &c., and was valid, therefore, only for the period of twenty-one years from the time of the testator's decease.

Secondly, that no part of the accumulated fund could be applied at the time of the decree in payment of the portions, or of any part of the 40,000*l.*

Thirdly, that the income of the accumulated fund, accrued since the expiration of the twenty-one years was disposed of by the statute to the residuary legatees of the testator.

*Semble*, the "interest" which the parent of the portioned child must be possessed of under the 2d section must be an interest in the same property, real or personal estate, the income of which is directed to be accumulated.

*Semble*, the word "such" in the expression "such conveyance, settlement, or devise," in the same 2d section, refers to the object or nature of the instrument, not to the instrument itself.

*Semble*, the exception as to accumulation for payment of debts refers only to the debts of the person directing the accumulation.

THE principal question in this cause is, whether the trust for accumulation of the sum of 15,000*l.*, created by the will of Shute Barrington, formerly bishop of Durham, was valid beyond the term of twenty-one years from the death of the bishop, or, so far as it exceeded that period, was void by the provisions of the Thellusson Act, 39 & 40 Geo. 3, c. 98. The testator was uncle of George, late viscount, and great uncle to William Keppel, the present viscount, one of the plaintiffs in this case. The will of the testator takes notice that the family estates are at Becket, in Berkshire. By indentures of lease and release of the 20th and 21st April, 1823, being the marriage settlement of the present Lord Barrington, the estates were conveyed to the defendants Liddell and Price for 2000 years, *sans* waste, on the trusts thereafter declared, and, subject to the term for the payment, during the lifetime

<sup>1</sup> 16 Jur. 984.

of the late Viscount Barrington, of certain rent-charges and annual payments, and, subject thereto, to the late Lord Barrington for his life, remainder to trustees to preserve, remainder to the plaintiff Lord Barrington for life, remainder to trustees to preserve, with remainder to the use that the present Lady Barrington (the then intended wife) should have for her jointure a rent-charge of 1,500*l.* per annum, in case of her surviving the said George and William Keppel, with powers of distress and entry, and, subject thereto, to the first son of the marriage in tail male, with divers remainders over. The trusts of the term of 2000 years were declared to be as follows—namely, in trust, in case there should be any child or children of the said intended marriage other than an eldest son, whether born in the lifetime of the said William Keppel, (the plaintiff, the present viscount), or after his decease, and whether there should be issue male of the said marriage or not, that then the said trustees should, after the decease of the survivor of the said George (the late viscount) and William Keppel, (the plaintiff, the present viscount), or in the lifetime of them, or the survivor of them, if they or he should so direct, by any deed, &c., by demising or otherwise disposing of the hereditaments comprised in the said term of 2000 years, or any part of such hereditaments for the whole or any part of such term, raise for the portion or portions of such child or children the sum or several sums of money hereinafter mentioned, namely, if there shall be only one such younger or other child, the sum of 20,000*l.* for the portion of such one child, to become an interest vested in and after the decease of the said George, (the late viscount), to be paid to such one child at such age or time as the said William Keppel (the present viscount) should by deed or will, &c., appoint; and for want of such appointment, to be an interest vested in such only younger child, being a son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years or marriage, with consent, &c., and the money to be paid to him or her on or at the same age or day, if it should happen after the decease of the survivor of them, the said George and William Keppel; but if such day should happen in the lifetime of the said George or William Keppel, or the survivor of them, then to be paid within six calendar months after the decease of the survivor of them; and if there should be two such younger or other children, and no more, then the sum of 30,000*l.* for the portions of such children; and if three or more such younger or other children, then the sum of 40,000*l.* for their portions, to be divided between and among the children for whom the portions are provided, in such shares, and to vest in and after the decease of the said George, (the late viscount), to be paid to them respectively on or at such ages or days, and to be subject to such limitations over for the benefit of some one or more of such children, as the said William Keppel (the present viscount) should by deed or will, &c. appoint; and for want of appointment, the sums of 30,000*l.* or 40,000*l.* were to vest in such younger or other children, as to sons, at twenty-one, and as to daughters, at twenty-one or marriage, with consent, &c., in equal shares, and to be paid within six months after the decease of the said plaintiff, the present viscount. There were ten children of the mar-

riage, several of whom attained twenty-one years of age ; so that the sum raisable under the term was 40,000*l*.

The family estates being thus settled by his will, dated the 10th December, 1825, some months after the settlement, the testator, reciting so much of the said settlement as related to the portions for younger children, gave to his executors 15,000*l*, to accumulate, upon the following trusts : — “ In trust that they or he do and shall, within three calendar months after my decease, invest the same, (in government or real securities, with power to change the investment), and do and shall accumulate all the interest, dividends, and annual income of the said trust moneys, stocks, funds, and securities, during the lifetime of the said William Keppel, Viscount Barrington ; or if he shall depart this life within the term of twenty years, to be computed from my decease, and then the accumulation shall be continued for so long a period as, with that time that shall elapse during the lifetime of the said William Keppel, will make up the full term of twenty years, to be computed from my decease ; and upon the completion of the accumulation aforesaid, my said trustees shall stand possessed of the said trust moneys and accumulations, in trust to apply the same, or a competent part thereof, in satisfaction and discharge of the portions so intended for the daughters and younger sons of the said William Keppel, when and as the same respectively shall become payable, and in exoneration of the hereditaments charged therewith and subject thereto, upon and for the several trusts, intents, and purposes, and with, under, and subject to the several powers, provisos, and declarations hereinafter contained of and concerning my residuary personal estate, or such and so many of the said trusts, &c., as shall then be subsisting and capable of taking effect. Provided, that, if, before the expiration of the period for accumulation, the accumulated fund shall be of sufficient amount or value for answering the purposes aforesaid, then the accumulation shall thereupon immediately cease.”

In other parts of the will reference was also made to the settled estates, by making certain chattels heirlooms ; and in another part he gave 30,000*l* for building a mansion on the estates at Becket. The testator also gave other property, with an evident reference to the settlement ; and among other gifts, a sum of 10,000*l*, and also one moiety of his residuary personal estate, which was very considerable, to trustees for the younger children of the present plaintiff Lord Barrington, subject to the life-interest in George, late Lord Barrington, and his wife. The other moiety of his residuary personal estate he gave to George, Lord Barrington, if he survived the testator. The testator died on the 25th March, 1826. George, Lord Barrington, died in 1829. By deeds, dated the 17th June, 1842, and the 7th August, 1844, an undivided one tenth part of the premises comprised in the 2000 years term was assigned to Augustus Barrington, by way of mortgage, to secure the sums of 523*l* and 721*l*, which had been raised, with consent of the plaintiff Lord Barrington, for the advancement of one of his younger children ; and George William Barrington, the eldest son of the plaintiff Lord Barrington, having attained twenty-one years of age, the estate tail created by the settlement of 1823 was

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Barrington v. Riddell

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barred, and the family estates resettled upon other uses and trusts, under which all the different persons plaintiffs in this suit were interested. The other children of the present Lord Barrington and the children of George, late Lord Barrington, who were interested in the testator's residuary estate, were defendants. The 15,000*l.* given by the testator upon trust for accumulation was duly accumulated, and amounted, on the 24th March, 1847, that is, twenty-one years after the death of the testator, to 35,622*l.* It amounted at the institution of the suit to 43,643*l.* The present question arose between the parties interested in having the estate at Becket exonerated, and the parties claiming under the residuary dispositions in the testator's will, on a special case submitted to the court under the 13 & 14 Vict. c. 35.

The questions upon which the plaintiffs and defendants requested the opinion of the court were—

1. Whether the trust for accumulation, so as aforesaid directed by the will of the said testator, is valid for the whole of the life of the said plaintiff William Keppel, Lord Barrington, or for the period only of twenty-one years from the decease of the said testator; or for any and what other limited period, and to what extent, is such trust for accumulation valid?

2. Whether, according to the true construction of the said will, and the said indenture of settlement of the 21st April, 1823, the said accumulated trust-fund, or any and what part thereof, and to what amount, is now applicable in exoneration of the estates comprised in the said term of 2000 years, created by the said last-mentioned indentures of settlement, from the said portions or sum of 40,000*l.*, or in exoneration of the said estates from the said mortgage debts or sums of 523*l.* and 721*l.*, and the interest thereof, or any other and what part or parts of the said portions or sum of 40,000*l.*?

3. Whether any and what appropriation, and in whose names as trustees, ought to be now made of any and what part of the said accumulated trust-fund, to answer, and at any and what future time, any and what part or parts of the said portions or sum of 40,000*l.*, so as to exonerate the residuary estate of the said testator from all further or other liability in respect of the trusts for accumulation of the said fund?

4. In what manner is the interest of the said accumulated trust-fund to be dealt with until the said estates are by means of it exonerated from the said charge of 40,000*l.*, and who is entitled to the interest of the accumulated trust-fund since the accumulation ought to have ceased?

*W. P. Wood*, for the plaintiffs, Lord Barrington and those claiming under the resettlement of the family estates, seeking to establish the validity of the accumulation beyond twenty-one years. It is a very considerable interest in the tenant for life to have a power of charging these portions on the inheritance, and thus providing for children whom, but for this, he would have to provide for out of his own means. *Gillibrand v. Goold*, 5 Sim. 149, shows that the accumulated fund ought now to be appropriated in payment of the portions

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which may now immediately be appointed and advanced under the settlement of 1823. At least, we are entitled to have these two sums of 523*l.* and 721*l.* paid off.

[Sir G. TURNER, V. C. Then comes the question, what is a sufficient sum? There was a case of *Marsac v. Lyster* (unreported) before the Master of the Rolls. The settlement had been settled by Lord Eldon, and caused a good deal of obscurity. I think it was held, that the accumulations should go on and be a security for the payment of the whole, whenever it should become due.]

*Elborne v. Good*, 14 Sim. 165; s. c. 8 Jur. 1001, was the next case. We have a fund severed from the settled fund.

*Roll*, (with *W. P. Wood*). The portions in the exception in the 2d section of the act are to be portions to children of persons taking an interest, or to children of the deviser, settler, &c. Now, this means not only the actual children of the settler, but all persons to whom he stood in *loco parentis*, otherwise there are hardly any cases to which the authorities apply. *Bourne v. Buckton*, 2 Sim. (n. s.) 91; s. c. 9 Eng. Rep. 144.

*G. L. Russell*, (with *W. P. Wood* and *Roll*). It is said that a residue cannot be considered as a portion within the meaning of this exception. The word "devise" must not be taken too strictly.

[Sir G. TURNER, V. C. If the word "devise" is to be construed strictly, it will mean nothing beyond the very bequest to the child. It cannot, therefore, be taken in the very strictest sense.]

[He cited *Griffiths v. Vere*, 9 Ves. 127, and *Leech v. Leech*, 2 Dru. & W. 576.]

*Chandless* and *Greene*, for the residuary legatees. The court will interfere to set aside an appointment which has been made by the father with a view of getting the fund himself as an appointment to a consumptive child, &c. The interest meant is not an interest in the accumulations, but an interest in the fund itself, out of which the accumulations are directed.

[Sir G. TURNER, V. C. Observe what the act says. The 1st section enumerates nothing but the vicious part of the trust. I now address myself only to that part of your argument where you contend that the word "settlement" means to refer only to the vicious part of the settlement. The 2d section goes to the whole settlement.]

[They cited *Powis v. Mansfield*, 8 My. & C. 359; s. c. 1 Jur. 861; *Ex parte Dubost*, 18 Ves. 140, 154; *Macdonald v. Brice*, 2 Kee. 276; *Shaw v. Rhodes*, 1 My. & C. 160; *Evans v. Hillier*, 5 Cl. & Fin. 114; *Elborne v. Goode*, (*ubi sup.*); *Eyre v. Marsden*, 2 Kee. 574, as to the interest which the parent must take; *Morgan v. Morgan*, 15 Jur. 319, 321; s. c. 2 Eng. Rep. 35, where a chattel interest was held not to be sufficient; *Jones v. Maggs*, 16 Jur. 325; s. c. 10 Eng. Rep. 159, where a gift of the residue was not sufficient.<sup>1</sup>]

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<sup>1</sup> The reader is requested to correct the report of this case of *Jones v. Maggs*, by 38\*

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*Beech v. Lord St. Vincent*, 14 Jur. 731, and *Gillibrand v. Goold*, (*ubi sup.*) have no application to the present case.

*W. P. Wood*, in reply.

July 12. G. TURNER, V. C., after stating the facts of the case, a summary of which has been already set out. The fund destined by the testator for the exoneration of the family estates at Becket from the portions of 40,000*l.* amounted on the 24th March, 1847, being the end of the period of twenty-one years from the death of the testator, to the sum of 35,622*l.* It now amounts to 43,643*l.* The accumulated fund having thus proved to be inadequate to the exoneration of the settled estates at the end of the twenty-one years from the testator's decease, the plaintiffs, who are interested in the exoneration, contend that the trust for accumulation, as contained in the will, was valid and effectual beyond the term of twenty-one years from the testator's decease. The question depends entirely on the construction of the stat. 39 & 40 Geo. 3, c. 98. It being clear as to accumulation within the 1st section, it is only necessary to consider whether the present case falls within the exception contained in the 2d section, which provides "that nothing in this act contained shall extend to any provision for the payment of the debts of any grantor, settler, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction respecting the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not been passed." The question is, therefore, narrowed to this — is the trust created by this will a provision within the meaning of the statute for raising portions for children of persons taking an interest in any such conveyance, settlement, or devise, as was meant to be referred to by the statute? Three points appear to me to be involved in this question — first, what are portions in the sense here used; secondly, what conveyances, settlements, or devises are within the statute; thirdly, what interest must the persons have whose children, taking portions, are thus protected. In order to determine these questions we must look to the terms in which the statute is expressed, and what may be collected to have been the object of the legislature in making the exceptions above mentioned. The terms in which the statute is expressed throw no light on the question to what portions the statute was intended to refer, whether it was intended to refer exclusively to portions to be raised under the instrument creating the trust for accumulation, or exclusively to portions to be raised by antecedent instruments, or to include both these classes of portions. I do not find it necessary for the present purpose to determine exactly this question; but I have no hesitation in saying that I dissent wholly from the opinion expressed by the late Vice-

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striking out the words, "where there is some settlement on the parent, and," in the 27th and 28th lines of p. 161, Eng. Rep., which are contradictory.

Chancellor of England, that the exception as to portions in this section applies solely to portions created under antecedent instruments.<sup>1</sup> From the purview of the statute I am much inclined to think it was intended to apply only to portions created by the instrument directing the trust for accumulation.

But there are two cases in which it has been treated as applying to both classes of portions, and I bow to the authority of those cases, and proceed to deal with the questions in the present case, treating these portions as being portions within the meaning of the exception in the 2d section, although created by an antecedent instrument. Dealing with this part of the case in this view, then, I think the terms of the statute go far to show what "conveyances, settlements, or devises" the exception refers to, and what interest the parents of the children taking portions must take to bring their case within the exception in the 2d section. The 1st section recites, "that it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof postponed, should be made subject to the restrictions hereinafter contained;" and it enacts, "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so that the rents, issues, and profits thereof shall be wholly or partially accumulated for any longer period" than the periods particularly specified in that section. Then the section enacts, "that in every case where the accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, and profits, and other property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." And thus it is clear that what the legislature had in view was to restrain the accumulation of income of every real or personal estate by any settlement or disposition by deed, surrender, will, codicil, or otherwise; and it is to be observed, that amongst the periods beyond which accumulation is prohibited is the minority of any person who, under the uses or trusts of the deed, surrender, will, or other assurance directing the accumulation, would for the time being, if of full age, be entitled to the income directed to be accumulated. And the legislature, therefore, must also have had in view that other uses and trusts, besides the mere trust for accumulation, might be contained in the instrument by which the accumulation was directed.

The views of the legislature being thus ascertained from the 1st section, they must of course furnish a guide as to the construction of the 2d section, which is a mere exception from the 1st; and following this guide in the construction of the 2d section, I think there is little, if any, difficulty about it. Taking, for instance, the case in question — the exception of any provision for raising portions for any

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<sup>1</sup> In *Halford v. Stains*, 16 Sim. 486; see p. 496.



child or children of any person taking any interest under any such conveyance, settlement, or devise—what is meant by “any such conveyance, settlement, or devise,” but any conveyance, settlement, or devise of any real or personal property which contains directions for the accumulation of income, and under the uses or trusts of which some other person, whose children are to take portions, takes some interest in the real or personal estate, the income of which is directed to be accumulated? That the interest referred to means an interest in the real or personal estate, the income of which is directed to be accumulated, follows, I think, from this, that it is “an interest under a conveyance, settlement, or devise” of such real or personal estate. The doubt which has hung over the construction of this part of the section has, I think, arisen from the mistaken meaning of the word “such,” which has been read as if it referred to the particular instrument of conveyance, settlement, or devise directing the accumulation; whereas it refers, as I conceive, to any conveyance, settlement, or devise of any real or personal estate whereby the accumulation of income is directed—the word “such” being descriptive of the object of the instrument, and not of the instrument itself; and this falls in with the language of the statute. But if the word “such” be read as descriptive of the instrument, and not of its object, there is no antecedent to which it can refer, there being no previous use in that section of the words “conveyance, settlement, or devise.”

It was argued on the part of the plaintiff, that in the case of a conveyance or settlement, when the parents take an interest under it in other property than that which was directed to be accumulated, it could not be said that they did not take an interest under the conveyance or settlement; and that the same rule of construction must be applied to the word “devises” contained in the same clause; and this, no doubt, is true. But the whole force of this argument rests on the word “such” applying to the instrument, and not to the object of it; and it is the object, not the instrument, to which I think the word “such” applies. It was also suggested that the exception contained in this section, as to provisions for the payment of debts, extended to provisions for the payment of debts of any persons, and that a liberal construction ought, therefore, to be given to the like exception in favor of portions. But I think this argument is also founded in mistake. I think that the words “other person or persons,” as used in this section, were meant to authorize accumulations, not for the payment of the debts of any person or persons, but only for the payment of the debts of the person or persons directing the accumulation to be made—the words “grantor, settler, deviser, or other person or persons,” in this section, referring directly to the words in the 1st section, “that no person shall, by deed, surrender, will, codicil, or otherwise, settle or dispose;” and the words “other person or persons” relating to the words “or otherwise.” I am of opinion, therefore, that, upon the true construction of this statute, only those cases in which the parent takes an interest in the real or personal estate, the income of which is directed to be accumulated, fall within the exception in favor of provisions for portions of the

children of persons taking an interest; and I think that a consideration of the nature of the exceptions contained in the 2d section of the statute goes far to justify the conclusion that this was the intention of the legislature; for all the exceptions contained in that section (other than the provision as to timber, which may be accounted for upon other grounds) have reference to positive moral duties, namely, either the payment of debts, or making a provision for children; and it may well be that the legislature intended to encourage the performance of such duties, and to enable settlers to enforce them by subtracting from, or postponing, the interests of those on whom the discharge of the duties would naturally rest.

If, under the color of trusts for this purpose, or for any of the purposes excepted by the statute, extravagant accumulations should be directed, and mere colorable interests given to the parents, the arm of this court would probably be found long enough to defeat such schemes. The opinion which I have formed upon the construction of the statute being as above stated, the only remaining question which can affect the period of accumulation is, whether the present Lord Barrington can be considered to take any such interest in the fund to be accumulated as would warrant an extension of the period beyond twenty-one years from the death of the bishop. I am of opinion that he does not. He certainly takes no direct interest in the fund; and although he may be said to be indirectly interested in it, inasmuch as he has power to appoint portions in his lifetime, and upon his exercising the power (as he has already done) the fund so appointed becomes a charge on the estate, the interest of which he is bound to keep down, I do not think that this is such an interest as was contemplated by the statute. If this exception was founded upon such an interest in the parent, why was it not extended to all portions charged on estates, whether created by a parent or not? and why not extended to all charges upon estates for payment of debts? But it is clear that this was not intended. Besides, it is in the highest degree improbable that the legislature should have contemplated the case of portions payable in the parent's lifetime. Upon the whole, therefore, I am of opinion that the accumulation of the 15,000*l.* directed by the bishop's will, is not good beyond the period of twenty-one years from the time of the bishop's death.

The next question which arises is, whether the trust-fund, which had accumulated at the expiration of twenty-one years, is now applicable, in exoneration of the estate comprised in the 2000 years term, from the mortgage debts of 523*l.* and 721*l.*, and the interest thereof; and whether or not from any other part of the 40,000*l.* This appears to me to be a question of some difficulty; but I am of opinion that, under the peculiar constitution of this trust, as affected by the operation of the statute, no part of the accumulated fund is now applicable, nor can until the death of the present Lord Barrington be applied, in exoneration of the estates comprised in the term. The testator has, in the events which have happened, expressly directed the fund to be accumulated during the lifetime of the present Lord Barrington, and has declared that, upon the completion of the accumulation

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as directed, which would be upon the death of Lord Barrington, the trustees shall stand possessed of the accumulated fund, in trust to apply it in payment of the portions, when and as the same shall become payable, and in exoneration of the estates charged therewith; and under this trust I apprehend that the accumulation could not have been stopped by the application of any part of the accumulated fund in payment of portions which became payable in Lord Barrington's lifetime. What the testator evidently looked to was the payment of portions on the death of Lord Barrington, when, in the ordinary case, they would become payable; he was not looking to the benefit of Lord Barrington. But now the statute has intervened, and has not only stopped the accumulation, but has provided that the income directed to be accumulated shall go to the person who would have been entitled thereto if the accumulation had not been directed.

The case, therefore, is put in this position — that at the end of twenty-one years there is an accumulated fund, which is to be applied at a future time, and the income of which is, in the meantime, to go to the person who would have been entitled to it if the accumulation had not been directed; and in this state of circumstances I do not see how it is possible that any part of the fund can be immediately applied. The difficulty which I have felt upon the point is this — if the accumulation had reached 40,000*l.* within the twenty-one years, it would have ceased under the provisions of the will; and it might then have been well argued that the accumulation was complete, and the fund applicable for payment of portions. Then, it may be urged, why may not the same argument apply to the accumulations up to the period when they were stopped by the statute? I think, however, that the answer to this difficulty is, that in the case supposed, of the accumulation reaching 40,000*l.* within twenty-one years, the statute would never have come into operation, and there would have been no statutory provision for the application of the income; but that in the case which has happened, of the accumulation not reaching the 40,000*l.* within the twenty-one years, the statute has prescribed the application of the income. My answer, therefore, to the second question is, that no part of the accumulated fund is now applicable to the payment either of the mortgages referred to, or of any part of the portions. My answer to the preceding questions leaves no difficulty as to the remaining points. The answer to the third question must be negative; and the answer to the fourth question, that the income already accrued on the fund, and to accrue at the expiration of twenty-one years, belongs to the residuary legatees of the testator until the death of Lord Barrington.

*Bethell.* Your honor said, "is now applicable," in answer to the second question: you mean during Lord Barrington's life.

Sir J. TURNER, V. C. I took the language of the case when I said "is now applicable."

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Thornton v. Tenlow; Davenport v. Davenport; Deerpurst v. Jones.

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THORNTON v. TENLOW.<sup>1</sup>

November 11, 1852.

*Practice—Master in Chancery Abolition Act—Application for Production of Documents.*

W. P. WOOD moved from the production of documents admitted by the answer to be in the defendant's possession. The application was unopposed.

Sir G. TURNER, V. C. The judges of the various branches of this court have considered the question as to these motions for the production of documents. They think that, under the new act, all these applications ought to originate at chambers. The effect will be, that where there is no dispute as to the production of the documents, all the expense of these motions will be saved. If, on the other hand, there appears to be any difficulty as to the production, the judge will adjourn the matter into court, in order that it may be argued there.

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DAVENPORT v. DAVENPORT.<sup>2</sup>

November 11, 1852.

*Practice—Master in Chancery Abolition Act—Payment of Purchase Money into Court where the Title is accepted.*

On an application being made for leave to pay the purchase-money into court,

Sir G. TURNER, V. C., said that the judges were also of opinion that such applications, when the purchaser was satisfied with the title, might be beneficially made at chambers. At least, this would be for the pecuniary advantage of the suitors.

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DEERHURST v. JONES.<sup>3</sup>

November 11, 1852.

*Practice—Attendance of a Common-law Judge, under the 14 & 15 Vict. c. 83, (1851.)*

HOLT asked that a day might be appointed to hear a case in the presence of a common-law judge.

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*Ex parte Markwell; In re The Metropolitan Railways Junction Co.*

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Sir G. TURNER, V. C., said that the application to the common-law judge must be made by the Lord Chancellor. He would write to the Lord Chancellor to request him to make such application and ascertain when it would be convenient to the common-law judge to attend; and would communicate the result to the parties.

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*Ex parte MARKWELL; In re THE METROPOLITAN RAILWAYS JUNCTION COMPANY.<sup>1</sup>*

May 22, 1852.

*Contributory — Roberts's Case distinguished.*

A consented to become a provisional committeeman on condition that he should not incur any liability. Afterwards he took shares in the company without repeating the stipulation:—

*Held*, that by taking shares he became liable as a contributory, under the authority of *Upstill's case*.

THIS was a motion, on behalf of Mr. James Markwell, that an order of the Master engaged in winding up the affairs of the above-named company, dated the 19th March, 1852, directing that James Markwell should be placed on the list of contributories, might be discharged. The Metropolitan Railways Junction Company was projected in 1845. Mr. Markwell was the owner of land in the neighborhood of Billericay, near which the line of railway would pass. In September, 1845, Mr. Woodard, a solicitor, and the local agent for the company, advised him to become connected with the railway, and to be a patron of the line. Mr. Markwell requested to know whether he would incur any liability by so doing; and upon being assured by Mr. Woodard that the managing committee said that he would not, Mr. Markwell consented to be put upon the provisional committee as a patron of the line, upon condition that he should be free from liability. Mr. Markwell never attended any meeting of the provisional committee, and the business connected with the scheme was transacted by the committee of management. On the 8th October, 1845, Mr. Markwell applied for 200 shares. There was no evidence of any shares having been allotted to him, except the following letters from him to the solicitor of the company:—

“October 22, 1845.

“Dear Sir,—The pay-day of the Metropolitan coming so soon after the allotment, frightened all my acquaintances and myself; also sorry that they remained at par. It would have been judicious to have postponed the pay-day, as the panic in all the new projections

*Ex parte Markwell; In re The Metropolitan Railways Junction Co.*

alarms everybody. My wife, in addition to having been told, saw my name in the papers, and it has caused great uneasiness in that quarter. I must entreat you, therefore to get that withdrawn, that domestic differences may cease. With regard to the payment of the deposit, the affair came so sharp, that I was not by any means prepared, having all my ready cash out. I hope, however, that the company will see the necessity of postponing the day of payment, like the London and Exeter, which have postponed theirs for a week. I only came to town to-day from the country.

"I am, dear Sir, yours,

"J. MARKWELL."

"October 25, 1845.

"Dear Sir, — I am extremely obliged to you for your indulgence. There are two reasons for my delay in paying on the Metropolitans. The one is in consequence of this panic, which will soon subside. I have upwards of 3,500*l.* worth of scrip, and it has locked me up, like a great many more. The other is the awful state of the market generally. So if the indulgence could be extended, it would be all the better. This settling-day is frightful. I am obliged to go into the west of England, but shall be back in eight or nine days.

"I am, Sir, yours very obliged,

"J. MARKWELL."

*Daniel* and *Roxburgh*, for the motion, distinguished this from *Upfill's case*, 14 Jur. 843; 2 H. L. C. 674, the committee of management not being the same as the provisional committee; and argued that the condition upon which Markwell's consent to be placed on the committee had been given would prevent his liability as a contributory. *Ex parte Roberts*, 3 De G. & S. 205; 2 Mac. & G. 192. Besides these circumstances, there was no evidence of any number of shares having been allotted. *Ex parte Carmichael*, 17 Sim. 163; s. c. 1 Eng. Rep. 66; *Conway's case*, 16 Jur. 120; s. c. 8 Eng. Rep. 250; *Tanner's case*, 16 Jur. 214; s. c. 9 Eng. Rep. 162.

*Bacon* and *Selwyn*, for the official manager, contended that the case was within the authority of *Upfill's case*, it being evident that there had been here an allotment of a distinct number of shares, from Markwell's letters, and that the conditional agreement was not entered into by any one who had authority to bind the company.

*Daniel*, in reply, referred to *Norris v. Cottle*, 2 H. L. C. 647.

Sir J. PARKER, V. C. I think that *Upfill's case* decides the case now before me. That is an authority binding on this court, and whatever may be said of the reasoning in it, I do not think that there is any difficulty in applying the case to another in which the circumstances are similar. *Upfill's case* decides that a member of the provisional committee, who accepts shares allotted to him, is a contributory. Here, a gentleman, who was clearly a member of the provisional

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Lowes v. Lowes.

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committee, accepts shares. There is a letter from him which is evidence of that. It appears to me that there is no doubt that there was an allotment and acceptance of shares. It is for him to show what that allotment consisted of. He says that there was a special agreement between himself and the governing body, by which it was stipulated that he was to be under no liability. The evidence of that agreement is loose, and there may be doubts raised as to whether the persons who entered into it were competent to bind the company. Passing by that, what is the nature of the agreement itself? This gentleman appears to have had no intention of taking shares at all originally, but he stipulated that, by becoming a member of the provisional committee, he was not to be subject to any liability. If he had been merely a member of the provisional committee, he would have been under no liability. At a subsequent period he agreed to take shares, and at that time he was not in any relation to the company which made him liable. He then entered into a relation which brought upon him the liability which was considered to attach in *Upfill's case*. If he had repeated the stipulation that he was to be under no liability, the question would have been the same as that which was raised in *Roberts's case*, and the court would then have had to consider how that case would bear upon this. It appears to me, that when he took shares, he entered into a new relation with the company, and did not then stipulate that he should be free from liability; and therefore, I think, that this is within the authority of *Upfill's case*, and that he is liable.

*Motion refused, with costs.*

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LOWES v. LOWES.<sup>1</sup>

November 12, 1852.

*Practice* — 15 & 16 Vict. c. 86, s. 52.

The 52d section only applies to the usual supplemental decree, and not to the case of a creditor, not a party to the suit, applying on notice, served with leave upon all parties, for an order that the suit might be revived, and the proceedings carried on by the creditor.

Leave to file a supplemental bill refused on this motion.

In this case, reported 16 Jur. 968; s. c., *ante*, p. 438,

*Forster* now moved, by leave, upon notice, which had been served on all parties, "that the suit might be revived or perfected, and the proceedings carried on by *Eliza Kemp*." The suit was for administration of a testator's estate; the usual decree had been made, under which *Eliza Kemp*, who was not a party to the suit, had been found by the Master to be a creditor of the estate. The suit had since

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<sup>1</sup> 16 Jur. 991.

*In re Atkinson's Trust.*

totally abated by the death of the sole plaintiff, whose interest determined on her death; and Eliza Kemp, having served notice of motion, by leave of the court, now sought by this motion to obtain the conduct of the suit under the new practice, without filing a supplemental bill.

[STUART, V. C. You could not get an order of course under the 52d section.]

No; but for that section I must have filed a supplemental bill, but now that is not necessary. I am within the section upon a motion with notice, though I could not have an order of course.

STUART, V. C. The 52d section applies to the usual order or decree. You are not within that section, because your case is not the usual case.

Forster. I ask, then, for leave to file a supplemental bill.

STUART, V. C. You cannot do that upon this notice of motion.

Nov. 15. THE LORDS JUSTICES made an order to revive and carry on the proceedings, on application of the creditor, by motion *ex parte*, under sect. 52.

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*In re ATKINSON'S TRUST.*<sup>1</sup>

June 9, 1852.

*Chose in Action, Assignment of—Insolvency—7 Geo. 4, c. 57—Notice.*

A person, being entitled to a reversionary interest in a trust-fund, became twice insolvent, but on neither occasion did he insert that property in his schedule, and the insolvent assignee did not give notice of the insolvency to the trustees of the fund other than by the general notice in the Gazette. Subsequently the insolvent assigned the reversionary interest to a purchaser for value, without notice of the insolvency, who immediately gave notice of the assignment to the trustees of the fund:—

*Held*, affirming the decision of the court below, that the assignment to the insolvent assignee, under the 7 Geo. 4, c. 57, s. 11, had no greater effect than an assignment for value would have had; and that, as the insolvent assignee had not perfected his title by giving notice to the trustees, the title of the subsequent purchaser for value must prevail.

THIS was an appeal from an order of Sir J. L. Knight Bruce, late Vice-Chancellor. The facts of the case were these:—In the year 1835, Alfred Argles, who was entitled in remainder to one third part of a sum of 700*l.* expectant upon the death of his mother, and which was held by trustees, sold and assigned his share to John Richard Cook, one of the petitioners, who immediately gave notice to the trustees of the fund, of the assignment to him. In 1848 the trustees

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<sup>1</sup> 16 Jur. 1003.



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*In re Atkinson's Trust.*

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paid the fund into court under the Trustees Relief Act. In 1851, the mother of Argles died, and the remainder came into possession. It then came out that Alfred Argles had been insolvent twice before the assignment for value in 1835, once in the year 1830, and again in the year 1834, but this property was not enumerated in either of his schedules. Accordingly, upon the present petition being presented by Cook for payment of his share, the petition was served upon the provisional assignee of the Insolvent Court, who appeared, and insisted that this property passed to him by the insolvency. Cook, the petitioner, made an affidavit, that at the time of his purchase he did not know, and had received no notice whatever, directly or indirectly, of the insolvency of Alfred Argles. It did not appear that any notice whatever of the insolvency had been given to the trustees of the fund. The question was, which had the better title to the money, the insolvent assignee, who had given no notice of the insolvency to the trustees other than by the Gazette of insolvents, or the subsequent assignee for value, who immediately gave the trustees direct notice of the assignment. Sir J. L. Knight Bruce, V. C., decided in favor of the assignee for value.<sup>1</sup> The provisional assignee appealed from that decision.

*Spencer Follett and Osborne*, in support of the appeal. We submit that, under the Insolvent Debtors Act, 7 Geo. 4, c. 57, ss. 11, 16, a complete statutory title to this chose in action, as well as all the other property of the insolvent, was vested in the provisional assignee, and no subsequent dealing by the insolvent could convey the title to another person. It was contended in the court below that there was no provision in the statute making the Gazette of the insolvency notice, and that, therefore, the title to the chose in action was not perfect; but we submit that if the legislature had intended that any further proceeding should be necessary to perfect the title, it would have provided for it. The distinction between this case and the ordinary contest of two assignees for value is this, that in order to complete an assignment of a chose in action notice is necessary, but this is not

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<sup>1</sup> The reporter has been favored with the following note of the Vice-Chancellor's judgment:—"I am not aware of any parliamentary enactment, that publication of an insolvency in the Gazette is to be deemed notice to all the world; and in the absence of that I must infer, from the evidence before me, that this share of the fund was bought for value without notice of the insolvency. But then it is said that the act vests every thing in the assignee. In my opinion nothing more passes than would pass by the fullest assignment the insolvent could have made, and the fact of a second of two incumbrances for value, giving prior notice to the trustee, has more than once been held to prevail in this court over the first. Then, the assignee has full means under the act of investigating and discovering the insolvent's property when he presented his petition, and unless the insolvent committed perjury, the assignee might have ascertained the existence of this fund. Under these circumstances, I am of opinion that the petitioner is entitled to his proportion of the fund against the assignee. I entertain no doubt upon the subject, although the case does not appear to have been previously decided, but I consider it a question of considerable importance, (so far as I can be said to consider any question of importance about which I have no doubt), and make this intimation to Mr. Follett in case the provisional assignee should wish to appeal from my decision."

*In re Atkinson's Trust.*

required by this act of parliament. The act of parliament says, every thing shall become vested in the provisional assignee, and he may sue in his own name. The old cases have put the doctrine of priority of a second assignee of a chose in action upon this ground, that the first assignee, by not giving notice, allowed the assignor to commit a fraud by selling to another person. *Ryall v. Rowles*, 1 Ves. 348; *Dearle v. Hall*, 3 Russ. 1; but that reasoning cannot apply here, for the provisional assignee had, in fact, no notice of the existence of this property; so that the result of affirming the decision of the court below will be, that the intention of the legislature may always be frustrated by any insolvent debtor omitting such property from his schedule. Questions like this have arisen in bankruptcy, where, after an act of bankruptcy, a man makes a second mortgage. *Collett v. De Gols*, Forr. 65; *Ex parte Knott*, 11 Ves. 609. The principle is this, that the second mortgagee has a right to avail himself of the legal estate to protect himself. But here this question does not arise, for there is no legal estate outstanding — the whole is vested in the provisional assignee, and we are only dealing with the equities, and the provisional assignee has not omitted to do any thing which he ought or could have done. Prudent purchasers always search the records of the Insolvent Court.

LORD CHANCELLOR, (Lord St. Leonard's). There are two questions here — one, on the title of the insolvent assignee, whether that of itself is so perfect that it cannot be disturbed; and the second, upon the title of the assignee for value. I consider it to be a settled question, that the assignees under the Insolvent Act took only precisely what the insolvent himself had, and clearly subject to all the equities to which the insolvent himself was liable. That proves the nature of the estate. They do not take an independent property, as if they were the original persons to whom it belonged, but they take it as the representatives of the insolvent, and stand in his shoes; they take what he had to give, and are liable to all the incumbrances and equities by which he himself was bound. Now, it is said at the bar, that the effect of the act of parliament is to vest the property so wholly in the assignees, that the insolvent cannot himself by any act afterwards divest it. There are no words giving that effect to the assignment; but the act directs the insolvent to execute an assignment; and the assignment, when executed, will, of course, have as high, but it cannot have a higher, operation, unless more operation is given to it by the act of parliament, which the act of parliament does not confer, than an assignment for value, executed by an insolvent before his insolvency, could have had; for the assignees shall have all that he is entitled to, and you shall take it, for that is law, subject to all his liabilities. Now, do the assignees take it in a sense in which they shall not be liable to the general equities of this court? There is a positive rule of law which gives to a subsequent purchaser of an equity, who has given notice, priority over a prior purchaser who has not given notice. That is a settled point in this court, and cannot now be disturbed — that a man who has taken the greatest care, both

*In re Atkinson's Trust.*

to secure himself and to give notice to those who hold the fund, shall have the benefit of priority over a prior man who has neglected that precaution; otherwise the rule "*qui prior tempore potior est jure*" must prevail. Now, if I be clearly of opinion that the assignees in insolvency have no further right than if they were purchasers for value, then the question arises, whether the purchaser has done all he was required to do. It struck me, in the course of the argument, that there was a case in the house of lords some years ago, which came from Ireland, *Warburton v. Loveland*, which showed a subsequent act of carefulness on the one side, and carelessness on the other, with regard to a legal title. There a woman had a leasehold estate, and before her marriage she assigned that property to trustees, upon certain trusts, for herself and her husband. That deed was not registered, and the husband, after the marriage, made a lease, and that lease was registered; and it was held that that lease had priority. I remember arguing that case myself, with very great care and with some little confidence, that there was no estate that could be transferred, for the estate belonged to the wife, and had actually been transferred from her before the marriage, and therefore the husband never could take any property that could be the subject of a deed, to which effect could be given by registering; but the judges were of a different opinion, and the house of lords held, that the lease having been registered, the lease prevailed, and that although, in point of law, the husband never could take any legal interest in the property which was the subject of his lease.<sup>1</sup> That shows, therefore, reasoning by analogy, that the mere circumstance that you have got a legal interest vested in you would not prevent the operation of a rule like that in this court—that where a second person comes in who has used due diligence by giving notice, he may prevail over the prior assignment, however valid that, standing by itself, would have been. Then, as regards the second question, there seems to be no difficulty, because the purchaser swears that he knew nothing of the insolvency, and he gives notice; it has been held that notice is sufficient; and therefore it is valid in that respect. It is said this is a very hard case; and so it may be, and it may be open to some mischief; because, the insolvent being insolvent twice, he each time commits something which is illegal. I cannot treat this as a case of hardship upon the assignees of the insolvent, but as a question of right between the assignees and the purchaser. If I were to decide against the purchaser, then the hardship would be on his side. One party must lose; therefore the mere representation of hardship amounts to nothing. But it ought to teach assignees this—to be more diligent in inquiring as to the property which really belongs to insolvents; and I cannot but doubt, that if the assignees had taken that trouble, which they say the subsequent purchaser ought to have taken, of inquiring of the family, they must have discovered that this property was one in which the insolvent himself was interested. On the point of law I did not con-

<sup>1</sup> See *Rockfort v. Battersby*, 14 Jur. 229; 2 Jo. & Lat. 451, where a very similar point was decided.

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Sanders v. Rodway.

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sider it necessary to call upon the parties on the other side, as I consider it a settled point, and it would be unwise to discuss it. This appeal, therefore, must be dismissed with costs.

*R. Palmer* and *Schomberg* were for the respondent, but were not heard.

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SANDERS v. RODWAY.<sup>1</sup>

November 11, 1852.

*Injunction—Covenant in Deed of Separation.*

A husband entered into a covenant, in a deed of separation, that he would permit his wife to live separate from him, and would not molest her for so doing, nor visit her without her consent:—

*Held*, that the court will restrain him from infringing such a covenant.

THIS was a motion for an injunction to restrain the defendant, John Rodway, who was living separate from his wife, Elizabeth Rodway, from compelling his said wife to cohabit with him, and from molesting, disturbing, or troubling her for living separate and apart from him, and also from molesting, disturbing, or troubling any other person or persons for receiving, harboring, or entertaining his said wife, and from, without her consent, visiting her, or knowingly going into any house or place where she might reside or be, or sending, or causing to be sent, any letter or message to her, and from endeavoring or making any attempt to get possession of the person of his said wife, and from in any manner molesting or annoying her. The marriage between the defendant and his wife took place in the year 1828; but in 1834, in consequence of differences having arisen between them, they separated by mutual consent. On that occasion a deed was executed, bearing date the 19th February, 1834, and made between the defendant of the one part, and Mrs. Rodway, Benjamin Sanders, her father, and Benjamin Sanders the younger, her brother, of the other part, in which the defendant covenanted that he would thenceforth permit and suffer his said wife, during her natural life, to live separate and apart from him, and to reside and be in such places and families, and with such relations, friends, and other persons, and to follow and carry on such trade or business, as she should, notwithstanding her coverture, think fit; and that he would not at any time thereafter sue her in the Ecclesiastical Court or any other court for living separate and apart from him, or to compel her to cohabit with him, or sue, molest, disturb, or trouble her for such living separate and apart from him, or any other person or persons for receiving, harboring, or entertaining her, nor would, without the consent of his said wife, visit

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<sup>1</sup> 16 Jur. 1005.

*Sanders v. Rodway.*

her, or knowingly come into any house or place where she might reside or be, or send, or cause to be sent, any letter or message to her; and the defendant further covenanted, that he would not in any way claim or interfere with any property which his wife then had or might subsequently acquire. By the same indenture Benjamin Sanders, the father, covenanted that he would, during the remainder of Mrs. Rodway's life, clothe, maintain, and keep her, and would indemnify the defendant against any debts which she might thereafter incur, and he thereby also released the defendant from a debt of 300*l.* which was then due from him. Benjamin Sanders, the father, survived his son, Benjamin Sanders, the younger, and died in the month of March, 1852, having appointed his three surviving sons, who were co-plaintiffs with Mrs. Rodway, his executors. By his will, which was dated in 1845, he bequeathed a considerable sum of money to his executors, upon trust to pay the income to Mrs. Rodway, during her life, for her separate use. Mrs. Rodway resided with her father till his death, and subsequently with one of her brothers, who succeeded to the possession of the house. She suffered no molestation from her husband till a few weeks before the filing of the bill, since which time he had called at the house, and written letters to the family, and openly expressed his determination to use every means in his power to obtain possession of his wife's person. The bill was filed on the 29th October, 1852, and prayed an injunction in the same terms as the notice of motion.

*R. Palmer, Q. C., and Renshaw*, for the plaintiffs. The bill did not seek to restrain the defendant from applying to the Ecclesiastical Court, but simply to restrain him from violating his covenant contained in the deed of separation. *Wilson v. Wilson*, 14 Sim. 405; 1 H. L. C. 538; *Jones v. Waite*, 9 Cl. & Fin. 101. The release of the defendant's debt, and the covenant by Benjamin Sanders to indemnify him, and to support his wife, was sufficient consideration for the defendant's covenant.

*Rogers*, for the defendant, contended that the bill sought, in effect, to restrain the defendant from seeking his remedy in the Ecclesiastical Court; and that it would be against public policy for the court to enforce such a covenant as this.

Sir J. ROMILLY, M. R., said the suit was in the nature of a suit for specific performance of the covenants in the deed of separation, and was correctly brought by the representatives of one of the covenanting parties. The plaintiffs did not seek, by this motion, to restrain the defendant from proceeding in the Ecclesiastical Court, and he did not think that his decision would have that effect. The only question was, whether the defendant had entered into this covenant; if so, the court was bound to prevent him from infringing it. The injunction must be granted in the terms of the notice of motion.

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 Waterhouse v. Stansfeld.
 

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WATERHOUSE v. STANSFELD.<sup>1</sup>

November 5 and 6, 1852.

*Conflict of Laws — Mortgagor and Mortgagee.*

By the law of Demarara, lands cannot be mortgaged unless the intention to execute the mortgage be advertised in the Gazette, and the mortgage must be taken before a judge of the Superior Court. Any general creditor may, by an entry on the Rolls, prevent such mortgage from being taken. M., in 1845, contracted for the purchase from G. of certain lands in Demarara. In 1846, M. executed in England, in the usual English form, a mortgage of the lands to W., for securing the balance of the purchase-money advanced for M. by W. None of the preliminaries required by the law of Demarara had been previously observed. Then G. conveyed the lands to M., but by an accidental informality some parcels were omitted. Then M. became bankrupt. By the law of Demarara, a bankrupt's assignees have full and sole power to sell all his real estate. The assignees entered, and sold all the lands accordingly, both those which had been formally conveyed to M. and those parcels which, by accident, had not been conveyed:—

*Held*, first, that the *lex loci rei sitæ* must govern the application of the proceeds of the sale of the estate, just as much as of the estate itself.

Secondly, that there was no difference between the lands formally conveyed to M. and the lands accidentally omitted to be conveyed.

Thirdly, when the law of a foreign country places a restraint upon the alienation of property, a contract here respecting that property cannot be enforced against the foreign law.

By agreement in writing, dated the 14th August, 1845, William Grant agreed to sell to S. B. Moody lands in Demarara for 4,250*l.*, the conveyance to be executed on payment of the purchase-money. By indenture, dated the 10th October, 1846, in consideration of 2,000*l.* then advanced by the plaintiffs to S. B. Moody, he conveyed to the plaintiffs the premises in question in fee, and all the right, title, &c., of the said S. B. Moody, in trust, nevertheless, for securing to them the repayment of the said 2,000*l.* and interest, and further advances not exceeding 3,000*l.* The same deed also contained a covenant by Moody for further assurance, and a declaration that the plaintiffs might appoint a person to do all acts in the colony necessary for giving full effect to this present indenture. By a power of attorney of the same date a Mr. Porter was constituted the attorney both of Moody and the plaintiffs for carrying the mortgage into effect. These deeds were immediately on their execution sent to Porter, in Demarara. Shortly afterwards the plaintiffs advanced a further sum of 1,010*l.*, the balance of the purchase-money, to Grant. All these proceedings were duly made known to Grant, and acquiesced in by him. Part of the land was duly conveyed by Grant to Moody, but by an error of the officer of the court the remaining part of the estate was omitted to be legally completely conveyed to Moody at the time, and he ultimately became bankrupt before any complete conveyance was effected. In January, 1847, Moody mortgaged all the said premises comprised in the agreement of 1845, to Thomson Hankey &

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<sup>1</sup> 16 Jan. 1006.

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 Waterhouse v. Stansfeld.
 

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Co. for securing 3,500*l.*, and interest, subject, nevertheless, to a prior charge of 1,000*l.* mentioned to be charged on the property in question, and further advances, not to exceed 7,000*l.* in the whole. This mortgage contained the usual powers of sale and mortgage covenants, and a Mr. Rose was appointed the attorney for both parties to do all acts which should be necessary in the colony to give effect to the deed. In the month of February, 1847, Thomson Hankey instituted a suit in Demarara for the purpose of preventing the completion of the mortgage of 1846, by Moody to the plaintiffs; and on the 18th May, 1847, they obtained an interdict or injunction to that effect. On the 12th May, 1847, a fiat in bankruptcy was issued against Moody, under which he was duly made a bankrupt. The defendants were his assignees. The bankruptcy being pleaded in the courts of Demarara in bar of the said suits, all the proceedings were dropped and the suits determined. The unconveyed portions of the premises comprised in the agreement of August, 1846, were subsequently duly conveyed to the defendants by Grant or his attorney, and the defendants had since sold the same at the price of 1,394*l.* 9*s.* 8*d.* On the 25th November, 1850, the plaintiffs filed their claim against the defendants, praying that they might be declared trustees of the said estates and premises for the plaintiffs to the extent of the said two sums of 2,000*l.* and 1,010*l.* respectively. The case set up in answer to the claim was, that by the laws of Demarara, in order to render a mortgage effective, the intention of making the mortgage must have been previously advertised for four successive Saturdays in the official Gazette, and then passed before one of the superior judges; that the property in question must follow the law *rei sitæ*; and that by the law of the colony any creditor can prevent his debtor from giving any preference or advantage to one creditor more than another. By decree, dated the 14th August, 1851,<sup>1</sup> Sir. G. Turner, V. C., directed a reference to the Master for further inquiries as to the law of Demarara on the points, first, whether the plaintiffs acquired, by the agreement of the 14th August, 1845, or by payment of part of the purchase-money for the estate, or otherwise obtained, any lien upon the land for any and what sums; secondly, whether Moody, before his bankruptcy, or his assignees since, had the power to sell the lands free from the claims of any creditors; and, thirdly, whether his creditors, or any of them, had the power to prevent such sale, or had any interest in the proceeds of such sale further than generally as creditors. The opinion of a late *puisne* judge and of a late solicitor-general in the colony was obtained, to the effect, that neither by the indenture of October, 1846, nor by the payment of part of the purchase-money, nor in any other manner, had the plaintiffs obtained any lien on the land in question, to the exclusion of the general creditors of Moody; that the assignees of Moody were the only persons competent to sell; that no creditor could prevent the assignees from selling, and that the assignees could have compelled Grant to execute any further assurance to them or their vendees; and that any credi-

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<sup>1</sup> See 12 Eng. Rep. 206.

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Waterhouse v. Stansfeld.

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tor of Moody could have prevented Grant from executing any assurance to any person but the assignees or their vendees, by entering what, in the Demarara, law is called an opposition on the court-rolls, of which the judge would take notice when the conveyance came to be enrolled. The Master found, in accordance with this opinion, against the claim of the plaintiffs. The case now came on to be argued on exceptions to the Master's report.

*Bacon and Cairns*, for the plaintiffs. In *Ex parte Pollard*, 4 Deac. 27, the principle is established, that the court, having before it the person who has entered into a contract concerning the land, and the money, the proceeds of a sale of the land, will enforce the equities of the parties upon the proceeds, although it would have no power over the land itself. The general creditor has no claim upon the land until he proceeds to execution. The assignees of Moody cannot now fall back on what would have been his position if he had done all to make his title complete. The instance of an alien, who cannot hold land, but may receive the proceeds of the land directed to be sold, illustrates the proposition for which we contend.

*Rolt and Lewin*, for the defendants, the assignees.

*Cairns*, in reply.

In the course of the argument Sir G. Turner, V. C., said, that at the hearing it had been decided that the case of *Ex parte Pollard* did not govern the present case, for there the lands were in Scotland, the mortgage being executed in England, and there was by the law of Scotland no anterior impediment to the mortgage being completed; but that here the case set up was, that there was an anterior impediment to the execution of the mortgage, namely, that the intention to execute the mortgage must be advertised, and that any creditor of the intending mortgagor could prevent him carrying out his intention. The inquiries at the hearing had been directed also with a view of ascertaining whether the law of Demarara applied equally to the proceeds of a sale of real estate as to the real estate itself.

Nov. 6. Sir G. TURNER, V. C., after stating the case. The question, then, arises between the plaintiffs, and the defendants the assignees, as to the proceeds of the property, which was not legally and completely vested in Moody at the time of his bankruptcy. It was not on the present argument disputed, that, as to the lands actually conveyed by Grant to Moody before his bankruptcy, the plaintiffs had no lien at all. Then, is there any difference between the property in the hands of Moody unconveyed by Grant? The law of Demarara is clearly laid down in the able opinions which have been taken, to this effect—that no debtor can alien his lands except by certain set forms, and with the consent, express or tacit, of his creditors. As soon as the purchase-money was all paid to Grant



by Moody, or by the plaintiffs on his account, this property, though legally in Grant, was, in fact, the property of Moody; and the same forms would have to be gone through on a sale by him of the property, though not yet completely conveyed to him, as would have been necessary if it had been formally conveyed to him. There must have been an advertisement by Grant on the occasion of the alienation of the estate to Moody, and then Moody's creditors, or any one of them, would have had the power to intervene and prevent Grant from disposing of the estate in favor of any person but Moody or his assignees. Mr. Cairns said that no creditor would have such a power unless by taking out execution — that is, unless he had first proceeded to execution; but I do not read the opinion which has been taken in that manner. Mr. Downie, in his opinion on the case submitted to him, says, "By the law of Demarara a general creditor of S. B. Moody had a right or interest in the lots in question after the contract of the 14th August, 1845, and before a transport of them to Moody. The nature thereof was a common-law right or interest, and that which every creditor has in the property of his debtor." All the creditors of Moody, then, had this right. And then, in the latter part of the same opinion, Mr. Downie says, "The right of a general creditor of Moody would, therefore, extend also to prevent a transport from Grant being made to any other person than the assignees of Moody after his bankruptcy. The assignees being the representatives of Moody, as well as trustees for his creditors, a transport from Grant to them was compulsory on Grant." This was, therefore, the property of Moody in the hands of Grant, subject to all the rights and liabilities which attached to it, as much as if it had been already the subject of a transport or formal conveyance. When the law of a foreign country places a restraint upon the alienation of property there, a contract in respect of such property cannot be enforced against the *lex loci rei sitæ*. I am of opinion that the exceptions must be overruled. The argument for the plaintiffs passes by the consideration that the general creditors have something more than a possibility. Taking into consideration that the general creditors have got the benefit of the money advanced by the plaintiffs to complete the purchase, I think the justice of this case may be met by dismissing the claim without costs, and overruling the exceptions with costs. I do not see any substantial difference between the rights of the plaintiffs upon the portions of the land actually conveyed at the time of the bankruptcy and the lands which were then unconveyed.

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Newton v. Thomson; Saunders v. Walter.

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NEWTON v. THOMSON.<sup>1</sup>

November 6, 1852.

*Practice — Service of Notice of Motion.*

Where the defendant is out of the jurisdiction, and his solicitor had absconded, service of notice of motion at the solicitor's address for service held sufficient, though the place mentioned in such address was now untenanted.

COLE moved to confirm the Master's report. Notice of motion had been served as above.

Sir G. TURNER, V. C., made the order, on affidavit of the above facts.

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SAUNDERS v. WALTER.<sup>2</sup>

November 12 and 25, 1852.

*Practice — Master in Chancery Abolition Act — Inquiries at Chambers.*

The court will, in a proper case, adjourn the proceedings to chambers] for a limited time, to examine the evidence and Master's report, with the assistance of the chief clerk, but not for the case to be gone into before the chief clerk as a judge.

DICKINSON, on behalf of the defendants, brought this case before the notice of the court. The plaintiff had caused it to be set down for hearing before the long vacation, but had always made default. The question related to the residue of an estate, which had been found by the Master's report to consist of certain sums. The report was now complained of as inaccurate.

Sir G. TURNER, V. C. Adjourn the case to chambers, in order to ascertain whether the sums mentioned in the Master's report properly constitute the residue of the testator's real and personal estate, and to ascertain how much is principal and how much is interest. The registrar will enter a note of it in his book. Just simply adjourn the case, as if you were not satisfied with the evidence. If we were to go into the matter now, I should be able, no doubt, to see what further affidavits I should require; but the public time would thus be occupied by what could be done more conveniently at chambers.

*Dickinson.* We feel a difficulty, because the opposite side may say

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<sup>1</sup> 16 Jur. 1008; 22 Law J. Rep. (N. S.) Chanc. 10.

<sup>2</sup> 16 Jur. 1008; 22 Law J. Rep. (N. S.) Chanc. 11.

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Windsor v. Cross.

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that this proceeding on an *ex parte* application opens the whole question as to taking the accounts and other matters before the chief clerk instead of the Master. If it were before your honor, we should not feel the same difficulty.

Sir G. TURNER, V. C. But I do not want you to go before my clerk: I will see to it myself at chambers, with the assistance of my chief clerk.

His honor directed his secretary to write a note to the chief clerk, requesting him to ascertain whether the residue consisted of the particulars stated in the Master's report.

His honor then directed the case to stand over for a week, and said he would then inform the parties what further evidence, if any, he required.

A note to that effect was accordingly delivered to Mr. D., the defendant's solicitor, directed to the chief clerk of the Vice-Chancellor.

Nov. 25. On speaking to the minutes which had been drawn up, his honor said, there was not now the same inconvenience as formerly in sending a case for inquiries. Since the act (the Master in Chancery Abolition Act) the matter is not carried from one judge to another, but continues always before the same judge. If it appear that any substantial difficulty arises, the judge can adjourn it from chambers into court to be formally argued.

*W. P. Wood* was with *Dickinson*.

*Rolt* and *E. V. Neale*, for other defendants.

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WINDSOR v. CROSS.<sup>1</sup>

November 15, 1852.

*Practice—Alteration of Order by Amendment without supplemental Order.*

THE testator in this case appointed his wife guardian of his three children, and appointed her also executrix, together with two others, whom he appointed executors. An order for maintenance of the infant had been made out of a fund in court standing to the credit of the suit generally, which order had been acted on for about two years, and directed that an allowance for the maintenance of two of the infants should be paid to the mother alone, and that the allowance for the maintenance of the third infant, who was an apprentice, should

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<sup>1</sup> 16 Jur. 1008; 22 Law J. Rep. (N. S.) Chanc. 14.

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Vigurs v. Vigurs.

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be paid to the two executors and the executrix jointly, one of the executors having gone out of the jurisdiction.

*Whatley* now moved to have the order amended, by directing all future payments on account of such last-mentioned maintenance to be made to any two of such executors and executrix, instead of to all three.

Sir G. TURNER, V. C., doubted whether, as the matter had arisen subsequently to the date of the order, any amendment could now be made except by supplemental order; but, after consulting the registrar, he directed the amendment to be made in the original order.

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VIGURS v. VIGURS.<sup>1</sup>

November 15 and 16, 1852.

*Directing Action.*

A claim having been brought against an estate in the course of administration in a suit, and the legal rights of the parties not appearing to the court clear and beyond all reasonable doubt, and there being also a question as to the amount of damage, the court refused to decide the question, giving leave to the claimant to bring an action at law to establish his rights.

By a deed, dated the 18th June, 1751, John Llewellyn demised certain tinworks, in Glamorganshire, for the term of ninety-nine years, the lessees covenanting to keep the buildings in repair. This term was, in 1823, vested in Sir W. Garrow, who, by an indenture of the 25th December, 1823, demised it to John Vigurs and Leonard Smith for the residue of the term, wanting three quarters of a year, and Vigurs and Smith covenanted to repair. By an indenture of the 9th March, 1830, Sir W. Garrow assigned all his interest in the property to John Vigurs, W. N. Lettsom and Edward Badeley, upon certain trusts, for the benefit of his family. In 1831, Messrs. Vigurs & Smith dissolved partnership, and thereupon the property in question was assigned to Smith. Smith died in 1837, and in 1842, the heirs of John Llewellyn, the original lessor, sued Messrs. Lettsom and Badeley on the covenant to repair in the deed of 1751. The action was compromised in 1844, Messrs. Lettsom and Badeley, and also Messrs. Tennant, who had for many years been under-lessees, paying about 500*l.* and costs, and giving up the property. John Vigurs died in 1848; this suit was instituted to administer his estate, and Lettsom and Badeley brought a claim before the Master, on account of breach of the covenants to repair in the deed of 1823, for 1,657*l.*, at

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<sup>1</sup> 16 Jur. 1009.

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*Vigurs v. Vigurs.*

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which the damages had been estimated by surveyors, or at least for the amounts paid by them on the compromise. The Master disallowed the claim, and Lettsom and Badeley now excepted to his report.

*Malins* and *Lewin*, in support of the exceptions.

*Willcock* and *Marett*, for the plaintiff in this suit, supported the Master's report, and contended, that by the assignment of 1830 the covenants in the deed of 1823 were at law extinguished. *Cheetham v. Ward*, 1 B. & P. 630; *Ford v. Beech*, 11 Q. B. 864. That the claimants had no equity, as Mr. Vigurs had long parted with the property, which had been given up by Messrs. Lettsom and Badeley. That if they had any rights the evidence on the claim for 1,657*l.* was insufficient; and that they had no right to recover what they had chosen to pay on the compromise. *Penlee v. Watts*, 7 M. & W. 601.

*Selwyn*, for the defendants in the suit on the same side.

*Malins*, in reply, argued that the claimants had good legal right to recover; that the court had now power to decide legal questions; and as to the amount due, if his honor felt any difficulty, he could ascertain the amount in chambers. *Mildmay v. Methuen*, 16 Jur. 965; s. c. *ante*, p. 430.

Sir R. T. KINDERSLEY, V. C. These exceptions are filed by a creditor, or a person claiming to be a creditor, upon covenant, and it is contended that Mr. Vigurs, whose estate is sought to be made liable, was liable upon a covenant in a deed of the year 1823; that he was liable to Sir W. Garrow, and that the present covenantees are assignees of Sir W. Garrow, and stand in his shoes as to the right to recover damages. Now, this claim is put forward as a legal claim, and it is contended that if there had been no administration suit, and nothing, therefore, to have prevented the present covenantees from bringing their action against the executors of Mr. Vigurs, that action would have been brought, and the plaintiff in it would have recovered, if not the whole 1,657*l.*, yet a considerable sum; and it is insisted on the other side, that there is no right to maintain the action, and if that is clear, this court will itself determine that matter, and not allow the parties to go to law and try the question. Now, unquestionably, if it were a matter clear and beyond all reasonable doubt, it would be the duty of this court at once to administer the estate without giving the creditor the right of trying this at law. If I was clear that it was a legal right, then it is my duty to allow the exceptions and give the amount claimed. But, after the arguments used and cases cited, it does appear to me, that both with reference to the question whether there is any legal right at all, and also with reference to the question whether, if there is a legal right, what is the amount of damage, if any — after all these arguments and cases, it

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Weston v. Filer.

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does appear to me that the proper course would be to let it go to a trial at law as the most fair and proper tribunal; and as I have come to that conclusion, I abstain from expressing any opinion upon the case. I ought to do so, for the purpose of showing what degree of doubt and difficulty is in my mind; but I think, that if I were to express any opinion upon the points, it might prejudice a fair trial; therefore it is sufficient to say, that I think it right to give leave, upon terms of the action being immediately brought, and the plaintiff dealing with the verdict as this court shall direct, the exceptions to stand over in the meantime. It appears to me, that if the parties resisting this claim are right, as very likely they are, it is a matter which would be determined upon demurrer, and that would afford the means of very speedy determination; though I do not mean to say that the demurrer will necessarily be the proper course.

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WESTON v. FILER.<sup>1</sup>

June 5, 1852.

*Trustee Act, 1850, Sects. 29, 30 — Constructive Trust.*

Sale under decree for sale, for the purpose of paying costs, of certain real estate, to which infants were beneficially entitled in case they survived their mother and attained twenty-one:—

*Held*, that the infants were not constructive trustees, and that a vesting order in favor of the purchaser could not be made under the above act.

THIS was a petition under Mr. Headlam's Act, 13 & 14 Vict. c. 60. The circumstances were, that John Jacob had devised, subject to the payment of his debts, all his real and personal estate to trustees, upon trusts for the benefit of Maria Williams for life, and after her death, for Eliza Weston for life; and after the decease of the survivor of them, then for all and every the child and children of Eliza Weston, their executors, administrators, and assigns, equally to be divided between them on their attaining twenty-one, as tenants in common; and if she died without leaving children, for the testator's own right heirs. Eliza Weston had two children, who were infants at the time of this petition. By an order in a suit concerning the testator's estate, it was directed that part of the real estate should be sold, for the purpose of providing a fund for the payment of certain costs of proceedings, to which the estate had become liable. A sale had accordingly been made, and T. Waddington, J. Wyeth, and R. Bayspool were the purchasers of several lots. The report of the purchase had been confirmed, and the purchase-money paid into court. The petition was presented by Eliza Weston's infant chil-

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<sup>1</sup> 16 Jur. 1010.

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Weston v. Filer.

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dren, praying that the court would declare that the two petitioners and the unborn children of Eliza Weston, on their coming of age, would become trustees of the estate, and that their estates might be vested in the purchasers, or that H. W. Weston, or some other proper person, might be appointed to convey to the purchasers. The trustees were all dead. The 29th section provides, that when a decree shall have been made by any court of equity, directing a sale of lands for the payment of the debts of a deceased person, all persons interested in such lands, as heir or under the will of the deceased debtor, are trustees within the meaning of the act, and the Court of Chancery is thereby empowered to make an order wholly discharging the contingent right under the will of such deceased debtor of any unborn person. Sect. 30, enacts, "that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands, or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interest of persons who, upon coming into existence, would be trustees within the meaning of this act; and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said court, or the said Lord Chancellor, might, under the provisions of this act, make concerning the estates, rights, and interests of trustees, born or unborn."

*Bilton* (*Malins* with him) contended that, under these sections, the infants and unborn children would become trustees at twenty-one.

Sir J. PARKER, V. C., did not think that these sections applied to the present case, nor that the infants were constructive trustees, and therefore he refused to make the order.

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Moate v. Moate.

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MOATE v. MOATE.<sup>1</sup>

June 7, 1852.

*Will — Construction — Survivor.*

Bequest to one for life, and then to be divided among four legatees equally, as tenants in common; if either died in the life of the tenant for life, his share to be divided among his children; if either died during that period without leaving issue, then his share to go to the survivors or survivor of them. One died leaving nine children, and then another died without issue, and then the tenant for life died:—

*Held*, that the children of the legatee who died first took no interest in the share of the one who died afterwards without issue.

ROBERT MOATE made his will, dated the 10th June, 1833, so far as material, in the following words:—"I give and bequeathe unto my dear daughter Mary Ann Moate, and my dear sons Joseph Moate, Samuel Moate, and Septimus Richard Moate, and the survivors and survivor of them, and the executors or administrators of such survivor, the sum of 3,000*l.* stock in the new 3*l.* 10*s.* per cent. annuities, standing in my name in that stock in the books of the governor and company of the Bank of England, to hold the said sum of 3,000*l.* stock, and all interest and dividends to become due and payable in respect thereof, unto them, the said Mary Ann Moate, Joseph Moate, Samuel Moate, and Septimus Richard Moate, and the survivors or survivor of them, and the executors and administrators of such survivor, upon trust that they, the said Mary Ann Moate, Joseph Moate, Samuel Moate, and Septimus Richard Moate, and the survivors or survivor of them, and the executors and administrators of such survivor, do and shall receive and take the interest and dividends which shall become due in respect thereof, and pay the same and every part thereof unto my said dear wife, Mary Moate, for and during the term of her natural life, and towards the maintenance of herself and the maintenance and support of my dear son John Moate, during the term of his natural life; and immediately after the decease of my said dear wife, Mary Moate, then I direct my said trustees, and the survivors or survivor of them, and the executors or administrators of such survivor, to pay and apply the said interest and dividends of the said sum of 3,000*l.* stock in, towards, and about the maintenance and support of my said son John Moate, for and during the term of his natural life, and the same to be from time to time paid and applied by them, my said trustees, in such parts and proportions, and in such manner and form, as they, or any two of them, or the executors or administrators of the survivor of them, shall think proper or expedient, and as shall in their, her, or his opinion be most conducive to the happiness and comfort of my said son John Moate; and from and immediately after the decease of my said son John Moate, I give and

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<sup>1</sup> 16 Jur. 1010.



*Moate v. Moate.*

bequeathe the said sum of 3,000*l.* stock, and all benefit and advantage thereof, unto my dear daughter Mary Ann Moate, and my said dear sons Joseph Moate, Samuel Moate, and Septimus Richard Moate, to be divided equally, share and share alike; and I hereby direct that in the event of the death of either of them, the said Mary Ann Moate, Joseph Moate, Samuel Moate, or Septimus Richard Moate, during the lifetime of my said son John Moate, the share of him, her, or them so dying shall be divided among all and every the child or children of him, her, or them so dying in the lifetime of my said son John Moate, upon such child or children attaining the age of twenty-one years; and in case of the death of any or either of them, the said Mary Ann Moate, Joseph Moate, Samuel Moate, and Septimus Richard Moate, during the lifetime of my said son John Moate, without leaving issue, then I direct that the share of him, her, or them so dying shall be divided among the survivors and survivor of them, the said Mary Ann Moate, Joseph Moate, Samuel Moate, and Septimus Richard Moate." The testator appointed his wife Mary Moate, his daughter Mary Ann Moate, and his sons Joseph Moate, and Septimus Richard Moate executors, and they, after his death, proved his will. The testator's son Samuel Moate died on the 3d May, 1839. The testator's daughter Mary Ann Moate died on the 18th June, 1839, unmarried. Mary Moate, the testator's widow, died on the 27th December, 1845. The testator's son John Moate died on the 3d June, 1846. The testator's son Samuel Moate left a widow and nine children, who, on the death of their father, took a vested interest in one fourth part of the legacy of 3,000*l.* stock. These nine children filed the present claim against Septimus Richard Moate, claiming to have one equal ninth part of the sums of 750*l.* and 156*l.*, 3*l.* 5*s.* per cent. bank annuities, transferred to each of six of them, who were of age, and to have the remaining three equal ninth parts transferred into the name of the Accountant-General of this honorable court, to the contingent account of three of them, who were infants; and that an account might be taken of what was due to the said plaintiffs in respect of the one third part of the one fourth part of the said sum of 3,000*l.*, 3*l.* 5*s.* per cent. bank annuities, to which they became entitled by reason of the death of the said Mary Ann Moate without issue in the lifetime of the said John Moate, and that for the purposes aforesaid all proper directions may be given. The question was, whether, in fact, they took any interest in Mary Ann's share.

*Taylor*, for the plaintiffs, argued that they were entitled to an interest in Mary Ann's share, and said that it was not necessary to contend that "survivors" should be read "others," for the intention was that the children of any of the four persons should stand in the place of their parent; and as, if Samuel had been living at this time, he would have taken one fourth of Mary Ann's share, so his children, standing in his place, were entitled to the same one fourth by substitution for their parent. *Willets v. Willets*, 7 Hare, 38.

[Sir J. PARKER, V. C. In that case, a child who survived took a

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Bradbury v. The Manchester, Sheffield, and Lincolnshire R. Co.

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share as a survivor, and that share was held to be subject to the gift in favor of his issue. That does not quite hit this case, for Samuel here did not take as survivor.]

He cited also *Leeming v. Sherratt*, 2 Hare, 14.

*Campbell*, for the defendants, cited *Crowder v. Stone*, 3 Russ. 217.

*Taylor*, in reply.

Sir J. PARKER, V. C., said that he did not see how it was possible to get over the words of the will. They clearly imported a gift to the four children as tenants in common equally, share and share alike. The testator then proceeded to contemplate the event of any one or more of them dying in the lifetime of the tenant for life, and either leaving or not leaving issue, and he disposed of the shares in either of these two events. If any child died in the lifetime of the tenant for life, the share of that person so dying, which must mean the one fourth share of such person, was given to his children; and then, in case of his death without leaving issue, such share was given to the survivors or survivor of them. His honor said, that, in the events which had happened, Samuel was clearly not the survivor; and unless the words "survivor and survivors" could be read "other or others," he could not take any part of Mary Ann's share; and unless he had taken it, it could not have been subject to the gift in favor of his children. There must be a declaration that the plaintiffs, as the nine children of Samuel, were entitled to his one fourth share, and that the share of Mary Ann Moate, at her death, went to her two surviving brothers. These two shares of Samuel and Mary Ann ought to bear the costs of the present suit, and what remained of them must be divided according to the declaration.

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BRADBURY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE  
RAILWAY COMPANY.<sup>1</sup>

June 12, 1852.

*Practice—Taking Action as tried.*

Though an issue may sometimes be taken *pro confesso*, it is not the practice to order that an action directed by the court to be brought and tried at the next assizes, and not so tried, should be taken as tried.

Where it was by the fault of both plaintiff and defendants that the trial did not take place, a motion by the defendants, that an action ordered to be brought and tried by the plaintiff should be taken as tried, and a verdict found for the defendants, and that the defendants should be discharged from their conditional undertaking, was refused, and the plaintiff was peremptorily ordered to try the action at the next assizes.

THE proceedings on the motion for the injunction in this case are reported 15 Jur. 1167; s. c. 8 Eng. Rep. 143. By the order made on that

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<sup>1</sup> 16 Jur. 1011.

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occasion, dated the 15th November, 1851, upon the defendants undertaking not further to prosecute any works upon the lands mentioned in the bill, and to discontinue the works already begun, and to leave the land in its present condition until the further order of the court, and the plaintiff undertaking to bring an action for the purpose of establishing his legal right, it was ordered that the motion should stand over; and it was ordered that the plaintiff should be at liberty to bring such action as he should be advised for the purpose aforesaid, and try the same at the next Liverpool assizes, the defendants (the company) admitting that the works complained of were done by them, and to produce all deeds and documents referred to in the affidavit of the defendants at the trial. This was a motion by the defendants in this suit, that the defendants might be discharged from their undertaking contained in the order of the 15th November, 1851; and that the action, which by the said order the plaintiff undertook to bring and try at the then next Liverpool assizes, might be taken as tried, and a verdict found therein for the defendants; and that the plaintiff's motion of the 15th November, 1851, might be dismissed, with costs, including the costs of the defendants of this motion, and of the proceedings in the said action at law. It appeared that the action was duly brought, and came on for trial at the next Liverpool assizes. The defendants had obtained a rule for a special jury, and when the action came on to be tried, ten only of the jurors answered to their names. Thereupon the defendants' counsel were applied to to pray a tales, which they refused to do, and then the plaintiff's counsel also refused to exercise their right to pray a tales, and the cause became a *remanet*.

*Malins* and *G. L. Russell*, for the motion.

[Sir J. PARKER, V. C., said that an issue might sometimes be taken *pro confesso*, but it was not the course of the court to direct that an action should be taken as tried.]

*Bacon* and *J. V. Prior*, for the plaintiff.

*Malins*, in reply.

Sir J. PARKER, V. C., said that he did not think the plaintiff could have lost his right to go on with the action by what took place at Liverpool, as to which it seemed to his honor that the plaintiff was not alone in fault, but there was something like a concurrence between him and the defendants that the action should not then be tried. The only doubt his honor had was as to continuing the undertaking as a term of the order; but considering what had taken place, and that it could be very little advantage to prosecute the works when there was sure to be a trial soon, the undertaking had better be continued, and the plaintiff must be under a peremptory undertaking to try the action at the next Liverpool assizes.

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*Ex parte Mac Birnie's Trustees; In re Mac Birnie.*

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*Ex parte MAC BIRNIE'S TRUSTEES; In re MAC BIRNIE.*<sup>1</sup>

January 28, 1852.

*Marriage Settlement—Trader—Right of Proof—Case stated under the 14th section of the Bankrupt Law Consolidation Act, 1849.*

A trader about to be married, and being, in fact, insolvent, of which insolvency the intended wife was ignorant, entered into a covenant with trustees to pay them a moderate sum of money, the interest to be paid to the wife's appointment, and, in default, to the intended wife for life for her separate use, then to the husband for life, and the capital to be in trust for the survivor absolutely. Property of the wife was also agreed to be settled upon the same trusts. The husband became bankrupt, and the trustees applied to prove for the amount, which had never been paid, but the commissioner rejected the proof:—

*Held*, on appeal, that the settlement was good as against the assignees, and that the trustees were entitled to prove.

THIS was a special case, stated by the authority of the commissioner, for the opinion of the court, he having rejected a proof for 500*l.* on the bankrupt's estate. From the case (which was stated at the instance of the trustees of a settlement, and granted under the authority of the 14th section of the Bankrupt Law Consolidation Act, 1849), it appeared that the bankrupt, John Mac Birnie, carried on trade in Devonshire, having a shop in Exeter, receiving payment for his goods by weekly instalments. He commenced business as a draper and tea-dealer in May, 1850, without any capital, but obtaining credit from the wholesale houses on the guaranty of his former master. Twelve months afterwards he made an offer for a composition, but by an arrangement he was able to go on. In June, 1851, being then still in insolvent circumstances, and being about to be married to Maria Harris, he executed a settlement, by which the one third of the intended wife, in a certain trust sum of 700*l.*, to which she was entitled in possession, was assigned to trustees upon certain trusts after stated, and the said bankrupt, in consideration of the intended marriage, and in pursuance of an intended agreement entered into in contemplation thereof, covenanted with the trustees to pay them on demand the sum of 500*l.*, with interest from the day of the marriage at the rate of 4*l.* per cent. per annum. And it was declared that the trustees should stand possessed as well of the one third part of the 700*l.* as of the 500*l.* settled by the bankrupt, upon trust, for such persons as Maria Harris should by deed or will appoint, and in default of appointment, upon trust, during the joint lives of the bankrupt and Maria Harris, to pay the income of the trust funds to her for her separate use; and upon the decease of either the bankrupt or Maria Harris, upon trust, subject to the said power of appointment, to pay the trust funds to the survivor, with power to the trustees to allow the trust funds to remain outstanding until Maria Harris should otherwise direct. By an agreement executed at the same time, the

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 15; 16 Jur. 807.

*Ex parte Mac Birnie's Trustees; In re Mac Birnie.*

contingent interest of Maria Harris in one half of another one third of the said sum of 700*l.* in the event of her brother dying under twenty-one years of age, and also all other property (if any) which might thereafter devolve on her, was agreed to be settled upon the same trusts as the 500*l.* The bankrupt continued in his trade until October, 1851, when he stopped payment, indebted, exclusively of the 500*l.* to the trustees of the settlement, in the sum of 1,302*l.* 19*s.* 10*d.*, of which above 800*l.* was contracted before the settlement. His assets consisted of stock and furniture, valued at 147*l.* 13*s.* 3*d.*; good debts, 630*l.* 6*s.* 4*d.*; doubtful, 372*l.* 18*s.* 10*d.*; bad, 189*l.* 5*s.* 10*d.*; total property and debts, 1,340*l.* 4*s.* 3*d.* The case stated that "the probable amount of the assets that will be realized is 365*l.*, in consequence of the peculiar nature of the debts contracted with traders of this class."

Mrs. Mac Birnie was examined, and the following portion of her examination was stated in the case. "I was engaged to my husband about nine months before we were married. About ten days previous to our marriage something was said about my property. I was entitled to one third of a sum of 700*l.* due on mortgage, which I was to receive on my brother's coming of age. My property was to be settled on myself. I did not know Mac Birnie's circumstances. I wished the settlement to be made to secure my money to myself. I employed Mr. Every to prepare the settlement. He acted for both of us. Mr. Mac Birnie and I went together to Mr. Every's, and instructed him to prepare the settlement. We went to him two or three times about it. No one went with me on my behalf. Mr. Mac Birnie made no statement to me about his affairs or his property. I did not know he was in debt at all. He owed my mother some money. I do not know if it was repaid before we were married. It was my own thought about having my property settled on me. I told Mr. Every to settle it in the usual way. I gave no directions as to the 500*l.* of Mr. Mac Birnie's. He said he would settle it on me. I did not know how it was to be paid." The commissioner added, "The court has no reason to doubt the truth of this statement."

The proof by the trustees for the 500*l.* was resisted by the assignees, and finally rejected by the commissioner, and his reasons were, that at the date of the settlement the bankrupt was embarrassed and had no reasonable expectation of avoiding bankruptcy, and that he entered into the covenant with a view of enabling the trustees to prove against his estate, in fraud of his creditors, and by way of indirectly making a provision out of his own property for himself in case of bankruptcy. The learned commissioner, in support of his view, cited — *Ex parte Cooke*, 8 Ves. 353; *Ex parte Hodgson*, 19 Ibid. 206; *Ex parte Hill*, Cooke's Bankr. Law, 7th edit. 238; *Higginson v. Kelly*, 1 Ball & B. 252.

*Shapter*, for the appellants, the trustees. There is no evidence in the present case of any fraudulent design by the bankrupt, as is attributed to him in the judgment of the commissioner. It is true a presumption would arise of such a fraudulent intention if the settlement,

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*Ex parte Mac Birnie's Trustees; In re Mac Birnie.*

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instead of being so small, had been extravagantly large. The cases on which the commissioner relied are rather in favor of the bankrupt, and are sufficient to support the appeal. No case goes so far as to hold that a settlement made before and in contemplation of bankruptcy, but in consideration of a settlement of property belonging to the wife, and where the intended wife has no notice of the design, if any existed, of a fraud on the creditors, can be set aside. It has long been settled that marriage is a valuable consideration, and the only section of the Bankrupt Act which relates to the setting aside of instruments on the ground of insolvency is the 126th section, and in that, contracts for valuable consideration are expressly excepted.

*Bacon* contended, on behalf of the assignees, that the mere fact of a deed being executed for value was not enough to save it from the consequences of fraud if fraud existed in the transaction, and so it was laid down in *Cadogan v. Kennett*, 2 Cowp. 432. The doctrine was also recognized in *Ex parte Meaghan*, 1 Sch. & Lef. 179; and *Campion v. Cotton*, 17 Ves. 263, strong as that case was, was clearly distinguishable from the present.

No reply was called for.

KNIGHT BRUCE, L. J. What we have to decide is, as to the effect we are to give to a marriage settlement which contains no reference to bankruptcy, but which does contain a simple and immediate covenant on the part of the intended husband to pay this sum of money. How this case would have stood if the intended wife had been implicated in any design to defraud the creditors of the intended husband, either by means of contracting for an extravagant settlement or otherwise, it is unnecessary for me to say. Nor is it necessary for me to say what would have been the result of the *bona fides* of the wife being impeached in some manner other than by the mere appearance and nature of the settlement, that is, if its terms might have made the wife suspect that its provisions were otherwise than usual or proper, by reason of its being out of proportion to the station and circumstances of the intended husband. The conduct of the wife, however, is not impeached. There appears to be nothing suspicious in this settlement, and it is such an one only as an honest woman well advised might reasonably and properly require. This disposes of the whole case. No fraud is imputed to her; I think sufficient does not appear to exclude a proof, and in that Lord Cranworth seems to concur.

LORD CRANWORTH, L. J. I not only concur in the conclusion to which my learned brother has come, but I do so substantially also for the reasons he has given. It has been said that this settlement was a fraud on the bankrupt law. In this I cannot agree. It has not been shown, or attempted to be shown, that the wife was party or privy to any fraud, — was *particeps criminis* if fraud there were. The transaction does not appear to be otherwise than fair, or not to have been entered into *bonâ fide*. I agree that the settlement of all the property to the separate use of the wife might have awakened suspi-

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*Ex parte Matheson; In re Matheson.*

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cion; but it did not do so, and so the commissioner has, in effect, found. The wife being cognizant of no fraud, the present case is distinguishable from those which were cited during the argument. I, however, guard myself against giving any opinion as to what would be the effect of a settlement showing in itself something so extraordinary as to make it evident that fraud was intended, as if the settlement had been of 50,000*l.* and not of 500*l.* That would have been too gross not to be seen. There is nothing of that sort here; there was no fraud and nothing to awaken suspicion. The settlement therefore, is valid, and the proof for the 500*l.* must be allowed. The costs of the petition may come out of the estate.

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*Ex parte MATHESON; In re MATHESON.*<sup>1</sup>

February 11, 1852.

*Bankrupt Law Consolidation Act, 1849—Railway Stock—“Government or other Stock.”*

The 201st section of the act enacts, that no bankrupt shall be entitled to his certificate if he shall within one year before his bankruptcy have lost 200*l.*, by any contract for the sale or purchase of “any government or other stock:”—

*Held*, on appeal, affirming the decision of the commissioner, that railway stock is within the meaning of this section.

In this case the certificate was opposed by the assignees before the commissioner upon several grounds, and Mr. Commissioner Perry refused it on account of reckless trading, of incurring debts without means of payment, of excessive speculations in shares, and also for the following reason stated in a memorandum at the foot of the decision, “And I declare that the bankrupt appears to me also not entitled to his certificate, he having brought himself within the penal provisions of the 201st section of the Bankrupt Law Consolidation Act, 1849, by a loss of 200*l.*, within one year next preceding the filing of the petition for adjudication in this matter, upon a contract for the purchase of railway stock, called ‘Leeds stock;’ and by a loss of 200*l.* within the like period, upon another contract for the purchase of ‘Edinburgh and Glasgow stock,’ being also railway stock; which two several contracts were respectively entered into by the said bankrupt, and were not to be performed within one week after the date of each respective contract.”<sup>2</sup> From this decision the bankrupt appealed.

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 18; 1 De Gex, M. & G., 448; 16 Jur. 769.

<sup>2</sup> The 201st section of the act is, so far as relates to this question, this:—“That no bankrupt shall be entitled to a certificate of conformity under this act, and any such certificate, if allowed, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering in one day 20*l.*, or within one year next preceding the issuing of the fiat or filing of the petition for adjudication of bankruptcy 200*l.*, or if he shall

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*Ex parte Matheson; In re Matheson.*

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After the case had been stated—

Knight Bruce, L. J., said, that his learned brother and himself thought that the arguments had better be confined in the first instance to the question whether railway stock was included in the act, as a decision on that point might render any discussion on the other parts of the commissioner's judgment unnecessary.

*Bramwell* and *W. M. James*, for the petition. The question here is, whether "other stock" can be said to include railway stock, or must not be construed to mean other stock *ejusdem generis* as the stock before mentioned in the act, namely "Government stock." It is very material, in the outset, to observe that when this term was originally used in the bankrupt law of this country, no such thing as railway stock existed, for railways were unknown; yet successive acts of parliament have been passed and still the words remain the same. Such an omission to alter the words is a manifest intention on the part of the legislature to exclude such stock,—the existence at the time of passing later acts, and especially the last act, of such stock being most notorious. Where the legislature did intend to guard against gambling in any stock it took care to use full and extensive words, as in the case of the Bubble Act, 6 Geo. 1, c. 18. The case upon railway stock, however, is not without authority, for in the case of *Hewitt v. Price*, 4 Man. & G. 355, which arose under the 5th section of the Stock Jobbing Act, 7 Geo. 2, c. 8, railway stock was held not to be included in the description of "other public securities," the words before used being "any public or joint stock." The reason given by one of the learned judges was, that railway stock was not "public stock," nor did it form any part of "public annuities." In that case the observation of Mr. Justice Bosanquet in *Wells v. Porter*, 2 Bing. (N. C.) 723, was cited, who said "When we find the expression 'public stocks,' we must intend the public stocks of this country;" and Lord Chief Justice Tindal assented to that proposition. If the view taken by the commissioner be right, then it is at variance with all the rules laid down by this court, for certainly no trustee who has power of investing in government or other stock would be permitted to invest the property of his *cestui que trust* in railway stock, and if he did, this court would make him responsible for any loss, on the ground that such an investment was a breach of trust.

The proper construction of the words "or other stock" is, that they are *ejusdem generis* with the former word "government;" the *genus* is stock, and stock guaranteed by this or any other government. The income of stock, thus meant, is not variable; but in shares it is; one is not, the other is subject to fluctuation like any other mercantile commodity. At the time of the passing of the Consolidation Act, in

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within one year next preceding the issuing of the fiat or the filing of such petition have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract."



*Ex parte Matheson; In re Matheson.*

1849, it was perfectly well known to the legislature what money was invested in railways, canals, and other public works; and had it been intended to include such moneys, the statute would have been clear and explicit in so enacting. Between the time when these words were used in acts of parliament and the passing of the last Bankrupt Act, it was well known that railway stock had been held by the courts not to be within the words of the Stock Jobbing Acts; and it is quite impossible to suppose that if railway stock were meant, it would not have been either specifically named or that some clear general word to include it would not have been made use of.

[LORD CRANWORTH, L. J. Do you contend that, in the case of a will, bank stock would pass by such words?]

*W. M. James.* Yes.

[KNIGHT BRUCE, L. J. And yet bank stock is fluctuating; it depends upon the profits of the bank as bankers.]

*Rolt and Kinglake* appeared for the assignees, but were not called on.

KNIGHT BRUCE, L. J. I am of opinion that the commissioner's decision is correct. The Bankrupt Act of 1849, singularly enough, considering the general import and object of it, does not continue or contain the provisions found in other and preceding acts of parliament as to construing it favorably to creditors. If the clause to which I allude had been found there, I am inclined to think no question could have arisen; but still it is a rule, and has been a rule from the earliest times, applicable to the construction of all statutes, that you must suppress the mischief, and advance the remedy to which they relate. If this be so, there can be no reasonable doubt that stock of the description referred to is as much within the mischief intended to be prevented,—is as much within the meaning of the 201st section of the act—as ordinary government stock, and certainly ought to be within the remedy. The words are “government or other stock,” and railway stock is so described by the legislature, in other statutes, in a way to warrant the application of the term “stock” to it. It has, however, been said that the 201st section is a penal section. To this I must not be understood as assenting; but whether it is so or not, I quite agree with the commissioner in thinking that the stock in question is “other stock” within the meaning of the clause. This, I apprehend, is the construction the words must bear.

LORD CRANWORTH, L. J. I am entirely of the same opinion. I think “other stock” means stock transferable in the books of a company, in the same manner as government stock is transferable in the books of the Bank of England. An argument was attempted to be adduced from earlier statutes, where more words were used. But so also, in other older acts, the different descriptions of wagering are specified, as by tennis, dice, &c. All such enumeration is left out here, because in modern acts the legislature is in the habit of omit-

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*Lake v. Currie.*

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ting all this enumeration of particulars. Here it was said, that stock of this kind cannot be within the meaning of these words, because they became part of the bankrupt law when shares of this description could not have been in existence. I think it would be unsafe to argue that stock was not intended to be included merely on this ground. With regard to the ingenious argument adduced in this case, that a trustee for investment in government or other stock would not be justified in investing in this stock, I think that argument is excluded, because a trustee is not justified in investing in foreign stock. My view of the case is even stronger than that of my learned brother. The petition must be dismissed, and with costs.

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LAKE V. CURRIE.<sup>1</sup>

July 30, 1852.

*Power — Real Estate — Execution of, by Will not referring to it —  
Wills Act, 1 Vict. c. 26.*

A testator being (under a deed of 1841) tenant for life of an estate A., with an ultimate reversion in fee in the same estate; and being tenant for life of estate B., with a power of revocation and new appointment, together with the ultimate reversion in that estate; by his will, referring to the deed of 1841, but not alluding to his power, confirmed that deed, and the trusts and provisions thereby declared; and reciting that he was seised and possessed of considerable freehold estates, and might become possessed of more, devised all his real estates, of which he might die possessed, to certain persons, upon trusts which were inconsistent with the trusts declared of estate B. by the deed of 1841. The testator was not, at the date of his will or of his death, possessed of any other estates besides estates A. and B.:—

*Held*, upon the construction of the whole will, that it operated as an execution of the testator's power over estate B.

*Held*, also, that the Wills Act, 7 Will. 4, & 1 Vict. c. 26, has not, by making the will speak as from the date of the death of the testator, and thereby passing real estate of which he was not possessed at the date of the will, assimilated the doctrine as to the execution of powers over real estate to that of the execution of powers over personal estate.

A testator, who in his will refers to a settlement, must, in the absence of something to show the contrary, be taken to know the general effect of that settlement.

By an indenture, bearing date the 10th of August, 1841, and made between the late Warwick Viscount Lake of the one part, and James Currie and Henry Towgood of the other part, the said Warwick Viscount Lake, for the considerations therein mentioned, granted, released and confirmed unto the said James Currie and Henry Towgood, and their heirs, certain freehold hereditaments in Aston Clinton, in the county of Bucks, (subject to a mortgage term of 500 years for securing the repayment of 1,200*l.* and interest), to the use of himself for life; and after his decease, to the use of the said James Currie and Henry Towgood, their heirs and assigns, in trust for the plaintiff, Gerard Warwick Lake, his eldest illegitimate son, his heirs and as-

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<sup>1</sup> 16 Jur. 1027.

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*Lake v. Currie.*

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signs forever; but in case the said Gerard Warwick Lake should die under twenty-one years of age, then upon certain trusts therein mentioned, with the ultimate reversion in fee to Viscount Lake. And the said Warwick Viscount Lake did thereby also grant, release, and confirm unto the same trustees all and singular the freehold messuages and hereditaments in the counties of Bucks and Herts respectively, particularly mentioned and described in the first and second schedules annexed thereto, and all his estate therein, at law and in equity, to hold the said hereditaments, subject to certain annuities therein mentioned, and to a certain term of 1000 years therein mentioned, to the use of the said Warwick Viscount Lake and his assigns, during his life, for his and their own use and benefit; and immediately after the decease of the said Viscount Lake, to the use of the said James Currie and Henry Towgood, their heirs and assigns forever, upon trust for such persons or person, for such interest or interests, and generally in such manner, as the said Viscount Lake should by his last will and testament in writing, or any codicil or codicils thereto, to be respectively executed and attested in the manner described by the statute for the amendment of the laws with respect to wills, direct or appoint; but in case no direction or appointment should be made, then upon trust for the said trustees to sell the same premises, and invest the proceeds in government or real securities, to be held upon trust for the plaintiffs (his illegitimate children) equally, as tenants in common: provided always, that it should be lawful for the said Viscount Lake, at any time or times during his life, by any deed or deeds, to revoke and make void all or any of the uses, trusts, intents, and purposes, powers, provisos, and declarations thereinbefore expressed and contained concerning all or any part or parts of the said trust estates, moneys, funds, and premises which should be subject to the subsisting trusts of that indenture; and by the same or any other deed or deeds, to appoint, declare, or create any new or other uses, trusts, intents, and purposes, powers, provisions, and declarations concerning the trust premises to which such revocation should extend. By a subsequent indenture of mortgage, Viscount Lake revoked the uses of the last-mentioned indenture for the purpose of raising a further sum of money on mortgage, and he thereby consolidated the several charges which then existed upon both the estates, and the estates were thereby made subject to a mortgage for a gross sum of 5,000*l.*; and the equity of redemption was reserved to the said James Currie and Henry Towgood, their heirs and assigns, upon the several uses, trusts, intents, and purposes, and under and subject to the several and respective powers, provisions, and declarations, including the power of revocation and new appointment, expressed and declared concerning the same hereditaments in and by the said indenture of the 10th August, 1841. Subsequently to this latter mortgage, the said Viscount Lake made his will, dated the 5th August, 1843, and after making sundry specific and pecuniary bequests, and reciting that he had by a certain indenture, dated some time in the year 1841, declared certain trusts, or otherwise had made certain provisions, for Elizabeth Lake and the

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plaintiffs, the said testator did thereby in every respect confirm the said indenture, and the trusts thereby declared, and the other provisions thereby made; and reciting that he was seized and possessed of considerable freehold and copyhold estates, and might become seized and possessed of more, he devised and bequeathed unto Elizabeth Lake (the mother of the plaintiffs) and her brother John O'Hara "all his freehold and copyhold estates and funded property, and all other real and personal estates, whatsoever and wheresoever, of which he might be seized or possessed at the time of his death, to hold the same unto and to the use of the said Elizabeth Lake and John O'Hara, their heirs, executors, administrators, and assigns, upon trust that the said Elizabeth Lake and John O'Hara, or the survivor of them, &c., do and shall execute all such conveyances and assurances, and do or cause to be done all such acts and things, as may be necessary or expedient for the purpose of giving full and complete effect in all things to the trusts in the said indenture expressed and declared, and to the other provisions thereby made;" and subject thereto, upon trust to sell the said estates, and out of the proceeds thereof, "in the first place, to pay all my just debts and funeral and testamentary expenses, and the said legacy of 300*l.*, and all pecuniary legacies which I may give by any codicil or codicils to this my will;" and as to the residue of the same moneys, upon certain trusts for the plaintiffs; and he appointed the said Elizabeth Lake and John O'Hara his executors. The testator made a codicil to his said will, bearing date the 24th of June, 1848, which was in the following words:—"I bequeathe to each of my daughters, Isabella and Elizabeth Lake, now in Scotland, 2,000*l.*" The testator died on the same 24th June, 1848. The Master found, in answer to the reference that was sent to him, that the testator was not at the time of his death seized or possessed of any freehold or copyhold estates other than and except the freehold estates mentioned in the said indenture of the 10th August, 1841; and upon consideration of all the matters, he found that the only appointments of the estates mentioned in the first and second schedules to the indenture of the 10th August, 1841, which the testator had made, were by the indentures for the purpose of creating mortgages in fee as a security for the repayment of 5,000*l.* An exception was taken to the Master's finding, to the effect, that by the operation of the said will or appointment, and of the codicil, the legacies of 2,000*l.*, by such codicil bequeathed to each of his daughters, Elizabeth and Isabella, became and are chargeable and raisable out of the real estates comprised in the first and second schedules to the indenture of the 10th August, 1841, and that, to that extent, the said will and codicil, or the said codicil, operated as an appointment of the said estates. The Master of the Rolls overruled the exception. This was an appeal from that decision.

*Rolt and Campbell*, in support of the appeal. The question in this case is whether, there being no personal estate to satisfy these two legacies of 2,000*l.* to Lord Lake's legitimate daughters, he has not, under the power reserved by the settlement of 1841, charged these

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legacies upon the estates by the will and codicil. The Master of the Rolls decided that there was no execution of the power beyond the mortgages; that is, that the will and codicil was not an execution of the power. The Master of the Rolls laid great stress upon that part of the will in which the testator confirmed the settlement. We cannot see the importance of that clause. Suppose the testator intended to revoke at some future time the entire uses of that settlement, there would be nothing inconsistent in his first confirming that settlement, under which he had the power of revocation; but where he only was about to insert by substitution a clause of the will into the settlement, leaving all the rest of the settlement unaffected, the explanation is complete. We submit that it is sufficiently clear that the testator knew of this power; he recites in his will that he was seized and possessed of freehold and copyhold estates,<sup>1</sup> and might become seized and possessed of more; he was not possessed of any estates except those over which he had the power, except the Aston Clinton estate, of which he was tenant for life; but over which he had no power. Therefore we submit, that under the law as it was prior to the last act, this was a good appointment; and this must be equally so under the present act, unless a contrary intention appears. The will expressly devises these estates subject to the trusts expressed and declared by the indenture of August, 1841. Why, then, is not effect to be given to the power of appointment, which was the very trust, of all others, to which it was most important to give effect?

*W. P. Wood and Chapman Barber, contra*, for the plaintiffs. When parties are driven to the doctrine of intention to prove the execution of a power, if the court found that there was no other property upon which the devise could operate, it executed the intention, but it was always open to show that no such execution was contemplated; therefore we may resort to the contrary intention appearing upon the will. The other side say that the testator had no other property; but he had the reversion in both the estates, and therefore he had something to satisfy the devise. The cases decide, that if I devise all my estates not in settlement, a remote reversion in the estates which were in settlement will satisfy the devise. *The Attorney General v. Vigor*, 8 Ves. 256. Next, as to the effect of the late Wills Act. The old rule was, that no general gift of personalty could amount to an execution of a power; *Jones v. Tucker*, 2 Mer. 533; and for this reason, that a party, though he might have no other property at the date of the will but that over which he had a power of appointment, yet might have a large personal property at his death, which he knew would pass by the will. The same rule, we submit, must now apply, to a general devise of real estate, since, by the late act, after-acquired property will pass by the will. The present devise is not specific; it would have passed all the

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<sup>1</sup> The testator was not possessed of any copyhold estates, but some of the property mentioned in the first and second schedules to the indenture of August, 1841, was inaccurately described as copyhold.

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estates the testator might have had at his death; but to make it an execution of the power, the other side ought to show that it would not have passed all the estates which he might have at his death. *Jones v. Curry*, 1 Swanst. 66. They contended, upon the construction of the will, that the testator could not have had in his contemplation the estates over which he had a mere power, for that it would be ridiculous to suppose that he intended to confirm the trusts of those very estates, which would necessarily include a confirmation of his own power of revocation and new appointment, when that instrument would have no effect until his death, when of course the power would be extinct; that the testator spoke of the probability of acquiring other estates, and that that would satisfy the devise, irrespective of the reversions in fee in both the settled estates which were vested in him.

*Rolt*, in reply.

LORD CHANCELLOR, (Lord St. Leonard's.) The question which arises in this case is, whether the will and codicil of the late Lord Lake operate or not as an execution of the powers, or either of them, reserved in the indenture of August, 1841. Before I enter into the facts of the case, it may be as well that I should state what the law is that is applicable to cases of this nature. This is, if an appointment at all, an appointment without any express reference to the power. It is clearly settled, independently of the late Statute of Wills, that a mere general devise or bequest does not operate as an execution of a power. It is also well settled, that where it is clearly shown that a testator is intending to dispose of real property, (the question generally arises as to real estate,) there, if he has no other real property, that is sufficient to show that he is dealing with that property; and whether the property be real or personal over which he has the power, if the court is sufficiently satisfied that he was dealing with that specific property, that will be a valid execution of the power. No doubt nice distinctions have been taken in the cases, but the general rule is clear. Now, it is said that the late Wills Act not only makes a general disposition operate as an execution of a power, but also makes a will speak as from the death of the testator; and that where there are general words sufficient to pass all estates, such as, for instance, a devise of whatever real estates he may have at his death, the combined effect of these provisions has altered the general law in this respect, namely, that as before the late statute a mere general bequest of personal estate could not operate as an exercise of a power, because the testator knew that the bequest would pass whatever he might have at his death, although at the date of his will he might not have any thing but the property over which he had the power; therefore, say they, since the statute enables a testator to pass all the real estates of which he might be possessed at the time of his death, the same rule must apply to real estate which formerly applied only to personal estate; and consequently that no general devise by will of real estate, where the testator had no real estate except that over which he had the power, can now operate as an

execution of the power, because he may have real estate before he dies which would satisfy the devise. Now, the statute, so far from operating in that way, evidently meant to enlarge and give greater effect to dispositions by will; it not only says that a general devise shall pass whatever the testator was seized of at the date of his will, and whatever he may be possessed of at the time of his death, but also that general powers of appointment over real estate, generally or particularly, shall be deemed well executed by the devise, unless a contrary intention shall appear by the will; therefore it is clear that the statute intended relief, and to extend, not narrow, the power. To hold that the old law is restricted, and that cases which, before the late act, would be considered as a due execution of the power, are not so now, would, I think, be utterly incompatible with the whole scope of the act. The statute says, that the devise shall operate as an execution of the power "unless a contrary intention shall appear by the will;" it is absolutely necessary, therefore, now, to show a contrary intention to exclude the execution of the power, where, under the old law you must, to give effect to the will, have shown an intention to exercise the power; the new law is, therefore, stronger for the appointees than the old law. Now, I think, if we bear in mind the difference between these two estates that were in settlement we shall have no great difficulty in seeing what the testator meant. By the deed of August, 1841, the Aston Clinton estate was settled upon the eldest of his illegitimate sons, with an ultimate reversion in fee in the settler, but expectant upon the termination of an estate which he never contemplated would fall in; and the other estate was so settled, that he had a general power of appointment over it, with what I may call a reversion in personalty in him upon a conversion by the trustees. Now, when the testator came to make his will, he wished to provide for his children. He knew that the Aston Clinton estate would and must go to the eldest son, as had been settled by the deed of 1841; then he had only to say, "I confirm that; but the other estate I have power over, and I may desire to introduce other provisions with respect to it, as it is the only property over which I have any power." He refers to the settlement in the will; and I take it that a man who refers to a settlement must be taken to have, not actually the very terms of the settlement before him, but the general effect of the settlement; and, unless there is something to show the contrary, I think the court is bound to take it that he perfectly well knew that the Aston Clinton estate was settled so that he could not disturb it, and that over the other property he had a power of appointing by will.

His lordship then went very carefully and minutely through the clauses of the will, and observed that there was but one way of reading it which would make it clear and intelligible, which was by supposing that the testator, when by his will he confirmed the trusts of the settlement of August, 1841, meant the trusts of the Aston Clinton estates; and that when he went on in the subsequent part of the will, to insert new provisions, he meant those new provisions to apply to the other estate over which he had the power. That to

*In re Wyld's Estate.*

hold a contrary construction, namely, that he meant the confirmation to apply to the trusts of the estate over which he had the power, would make the whole utterly inconsistent; as, for instance, there would then purport to be a trust for sale in the trustees of the settlement, and at the same time a trust for sale of the same estate in the trustees of the will, who were different persons; but that, if it were construed as he suggested, the whole will was given a natural and rational meaning. His lordship said — If I find estates A and B in settlement, and that as to estate A a testator had no power, but that as to estate B he had a power of disturbing the settlement, and if I find him in one part of his will confirming the settlement, and in a subsequent clause devising the estates, what is the natural construction to put upon such a will? Clearly to make the confirmation to operate upon the estate which he could not disturb, and to give effect to the devise of the estate in settlement over which he had an absolute power of appointment. I think, therefore, that by easy construction, some effect can be given to every word of this will. Is it possible, then, that I cannot give effect to this codicil, when I consider that the testator had no property not subject to the settlement? I will not allow myself to consider who the objects are. I profess to construe the will as if strangers were the objects of it, and have only to give effect to the rule of law. I differ from the Master of the Rolls, and have no doubt upon the matter. My opinion is, that this is a valid disposition of the property; consequently, that the exception must be allowed. The court declares that the will and codicil form a valid exercise of the appointment. In this judgment I have the concurrence of both my lords justices.

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*In re THOMAS WYLDE'S ESTATE; and in re THE TRUSTEE RELIEF ACT, 11 & 12 VICT. c. 96*<sup>1</sup>

November 5, 1852.

*Will — Construction of Bequest to Husband and Wife and a third Person.*

Testator bequeathed 700*l.* unto and amongst J. C. and C. his wife, and W. L.; and in a subsequent part of the will he bequeathed 200*l.* to the said W. L., and 200*l.* to the said J. C.; also 200*l.* to the said C., the wife of the said J. C.:—

*Held*, that J. C. and C. his wife were entitled to one moiety only of the 700*l.* between them, and that the other moiety belonged to W. L.

THOMAS WYLDE, the testator, by his will, dated March, 1788, gave and bequeathed unto the trustees therein named, and the survivor of them, and the executors and administrators of such survivor, the sum

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<sup>1</sup> 16 Jur. 1029.



*In re Wyld's Estate.*

of 700*l.* upon trust that they, the said trustees, or the survivor of them should lay out and invest the same in their names, or the name of the survivor of them, in 3*l.* per cent. bank annuities, and from time to time pay the interest, dividends, and produce thereof to, or otherwise permit and suffer his sister, Sally Eaton, the wife of Joseph Eaton, to receive the same for her life, for her separate use, benefit, and disposal, independent of her then present or any future husband, and her receipt and receipts alone to be sufficient discharges for the same; and from and after her decease the said testator gave and devised the said 700*l.*, or the stocks or funds in which the same should or might have been laid out and invested, unto and amongst John Collins and Catherine his wife, and William Lea, the cousin of the said testator, in equal shares and proportions; and the said testator gave and bequeathed unto his said cousin, William Lea, the sum of 200*l.* of like lawful money; and he gave and bequeathed unto the said John Collins the sum of 200*l.* of like lawful money; also he gave and bequeathed unto the said Catherine Collins, the wife of the said John Collins, the sum of 200*l.* of like lawful money. And as to all the rest, residue, and remainder of his estate and effects, whatsoever and wheresoever, he gave and bequeathed the same unto the said John Collins and Catherine his wife, their executors, administrators, and assigns forever. Upon the death, in 1851, of Sally Eaton, the tenant for life, the trustees of the will paid the stock purchased with the 700*l.* into court, under the provisions of the Trustee Relief Act. The present petition was for the purpose of having the fund paid out of court to the parties interested, and was, with their lordships' permission, transferred, shortly before the vacation, from the paper of the Vice-Chancellor to whom it was addressed, to that of their lordships. The question was, whether the fund was to be divided into thirds, of which John Collins and Catherine his wife were each to have one, and William Lea the other; or into moieties, of which the husband and wife were to have one, and William Lea the other. The petition was set down to be heard in the first instance early in August, but had stood over to search for authorities.

*W. W. Cooper*, in support of the former construction. The 700*l.*, or the stock arising therefrom, ought, it is submitted, to be divided into thirds, of which one will belong to each of the parties enumerated in the bequest. *Warrington v. Warrington*, 2 Hare, 54; *Paine v. Wagner*, 12 Sim. 188. John Collins and his wife take, not as joint tenants, but as tenants in common. In the simple case of a devise to a husband and wife and a third person equally, Popham, C. J., is reported to have laid it down that they were tenants in common, inasmuch as they took every one of them a third part. *Lewis v. Cox*, Serjt. Moore, 558, pl. 759. So, in *The Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547, a residuary bequest to husband and wife was treated as a gift to two persons, and the legacy duty distinguished accordingly. The case of *Gordon v. Whieldon*, 11 Beav. 170; 12 Jur. 988, will be cited against us; but that is a different case. So, *Bricker v. Whalley*, 1 Vern. 233; 4 Vin. Ab. 154, tit. "Baron and

Feme," M., a 1, pl. 9, will be relied on; but that case turned on the peculiarity of the expression by which the husband and wife were separated in the gift, by the conjunction "and," from the other persons — "to B., C., and D., and the wife of D."

*G. W. Collins*, in support of the same construction, cited *Lewen v. Cox*, Cro. Eliz. 695; 1 Vern. 32.

*Follett and Kinglake*, for William Lea. Upon the question whether, in the distribution of the 700*l.*, John Collins and his wife are to be reckoned as one person, or as two, the rule of law in the case of joint tenancy is thus stated by Littleton, lib. 3, c. 3, s. 291, p. 187 a. "Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have, in law, in their right, but the moiety, and the third person shall have as much as the husband and wife, namely, the other moiety, &c.; and the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint tenants, where the one hath, by force of the jointure, the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men; in this case the husband and wife have but the third part, and the other two men the other two parts, for the above cause." The anonymous case reported in *Skinner*, 182; s. c. 4 Vin. Ab. 154, pl. 10, is an authority exactly in point to the same effect, and was, like the present, the case of a legacy. *Bricker v. Whatley*, 1 Vern. 233, though treated with some speciality, also contains a recognition of the general rule. The bequest there was in equal shares between the testator's kinsman, Richard Bricker, Christian Bricker his sister, and his cousin Stephen Whatley and Hester his wife, equally to be divided amongst them; and it being proved that the wife was only of kin to the testator, and not the husband, the Lord Keeper was of opinion "that the husband and wife should have but one third part; and the rather, for that he observed the two 'ands' in this devise, namely, 'to A, B, and C and H. his wife;' and though a man may devise to two persons, and add an 'and' betwixt every person's name, yet it is not natural or usual to add an 'and' till you come to the last person." *Back v. Andrew*, 2 Vern. 120, is another authority in which the general rule stated by Littleton is recognized. No authorities having a tendency to impugn the rule are to be found until the cases of *Paine v. Wagner*, 12 Sim. 188, and *Warrington v. Warrington*, 2 Hare, 54. The former is, perhaps, distinguishable from those that have been cited, and from the present, inasmuch as the family between whom the question arose were named and described as "Mr. and Mrs. W. and children." The Vice-Chancellor says, "All parties who are named or described are to take between themselves as tenants in common." His honor seems, too, to have dwelt on the last circumstance, and to have considered himself authorized to escape from the effect of the rule, by holding that the parties were not to take as joint tenants — a ground of distinction which, it is submitted, is not tenable, and which was expressly

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disclaimed by Sir J. Wigram, V. C., in *Warrington v. Warrington*. With respect to that case, his honor distinguished it from those put by Littleton, by noticing that the husband and wife were not placed first in the enumeration, as is always done in Littleton's illustrations; and from *Bricker v. Whatley*, by noticing that the word "and" did not, as there, occur before the husband's name, to afford an indication of his being intended as the last person in the enumeration. Whether, however, these recent cases are or are not distinguishable in their circumstances from the older authorities, it is submitted that the general rule laid down by Littleton was clearly established, and that it must be considered still to be the law. [They cited also *Atcheson v. Atcheson*, 11 Beav. 485.]

*Hallett* appeared for the trustees.

*W. W. Cooper*, in reply. The number of shares into which the fund is to be divided must be determined by counting the legatees among whom it is equally given, and that whether the husband and wife take by entireties or in moieties as between themselves. In whichever way they take, the amount of the gift must be the same as between them and third parties. The proposition that husband and wife are to be regarded as one person is true for some purposes, such as upon questions of tenure, which are principally in Littleton's contemplation, but it cannot be considered as universally true. The case of *The Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547, is an instance to the contrary. The construction adopted by Littleton is the construction applied at common law, but it does not necessarily apply to a bequest of personalty, the construction of which is properly governed by the rules of the civil law. The real question is, what was the intention of the testator, to be gathered from the expressions made use of; and it is submitted that the intention to give a third of the fund to each legatee named is shown by the circumstance that, in a subsequent part of the will, the testator has given a separate and independent gift to each of the same three legatees by name; and also by the circumstance that in the disposition of the residue, where the gift is meant to be in joint tenancy, words of distribution, as "between" or "among," are not used.

Sir J. L. KNIGHT BRUCE, L. J. Whatever may be the state or the rule of the civil law on questions of this description, I do not think the construction of a will of personalty in this respect is governed by it; I mean of a will of personalty where husband and wife are concerned, the rights of husband and wife in respect of personalty standing by our law in a position so peculiar as they do. According to the rules and principles of that law, whenever a gift is made to husband and wife, the presumption is that it is given to one person, and that they take as one person; I say presumption, because the nature and context of the instrument may be such as to render a different interpretation necessary; but it lies on those who assert that they take as two rather than one to demonstrate that from the nature and context of

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the instrument. In my opinion that is not done here. The context affords a plausible argument of more or less weight either way; perhaps not of much strength either way, but not so that, in my opinion, the balance is in favor of that which would not be the ordinary construction. The consequence is, that, in my opinion, the *prima facie* interpretation must remain as the interpretation absolutely right. Nor do I see how in this particular will a different construction could be adopted without substantially contradicting the case of *Bricker v. Whalley*, 1 Vern. 233. My conclusion in this case may possibly be consistent with the cases of *Warrington v. Warrington*, 2 Hare, 54, and *Paine v. Wagner*, 12 Sim. 188. I am not sure that it is not. Viewing the state of the law as I do, and having regard to the case of *Bricker v. Whalley*, I am of opinion that I have no choice open to me in the matter, but that I must determine that the husband and wife take only a moiety of the fund, and must leave the other moiety to Mr. Lea.

LORD CRANWORTH, L. J. I at first felt some difficulty as to the proper conclusion upon this question, but after some fluctuation, my mind has arrived at the same conclusion as that of my learned brother, and upon nearly the same ground. Starting with a devise of lands, we find that where a joint estate is made by will to a husband and wife, and to a third person, in that case the husband and wife have, in their right, but the moiety—that is, as to an estate in joint tenancy; but I think it follows irresistibly, from the observations of Sir James Wigram, V. C., in his judgment upon the case of *Warrington v. Warrington*, 2 Hare, 56, that precisely the same reasons apply where the gift creates a tenancy in common. The whole question is, what is the part or share described by the terms of the gift; and where that is once ascertained, it matters not whether the tenancy be joint or in common. I take the rule to be, in all cases with regard to land, that which is laid down, as to a joint estate therein, in Littleton, s. 291, namely, that “if an estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have, in law, in their right, but the moiety.” That being the point from which to start with regard to estates in land, all convenience is in favor of construing the same words in the same way with respect to personal property as with respect to real property. The *onus* of showing that a different construction should be adopted is on the side contending for that construction. Now, I do not think the parties can possibly show it. On the contrary, the case of *Bricker v. Whalley*, 1 Vern. 233, as far as it goes, is a distinct authority to show that the same rule of construction is to be adopted in both cases. I confess I was at first very much struck with the decision of Sir James Wigram, V. C., in the case of *Warrington v. Warrington*, 2 Hare, 54, and I felt a difficulty in seeing a distinction between that case and the present. The distinction is very fine between that case and *Bricker v. Whalley*, 1 Vern. 233, as Sir James Wigram, V. C., himself thought. I think, however, that there was a distinction between the two cases. The ground upon which the Lord Keeper relied in

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*Bricker v. Whatley* was, that the use of the two "ands," occurring in the enumeration of the legatees, was not the ordinary form of expression, if it was meant that all the legatees named were to participate equally; but that, according to the ordinary construction of a sentence so framed, the "and," occurring before the names of Stephen Whatley and Hester his wife, must be taken to mean that the persons following it were meant to take, as if they were one person only, the same interest as each of the legatees previously named; the second "and," which occurred between the names of the husband and wife, being merely a sub-copulative, showing that the two were to be treated as one person in the distribution of the benefit given, just as they would have been, according to Littleton, had the case been one of a devise of land. There being, therefore, that distinction between the cases of *Bricker v. Whatley* and *Warrington v. Warrington*, the latter case is not in the way of the application of the original doctrine laid down by Littleton. The case, indeed, of *Paine v. Wagner*, 12 Sim. 188, is difficult to be got over, but that is a case to which one cannot look as to a strictly binding authority, when one considers the anomalous character of the will there, and the difficulty of finding a meaning in it at all. That being so, we are thrown back upon the original rule, as stated by Littleton and the earlier decisions; and by the law, as there laid down, we are bound to hold that the husband and wife, whether taking as joint tenants or as tenants in common, are entitled only to one moiety between them in the bequest in question. It is by no means unlikely that the result thus stated is contrary to what the testator intended; and not the less so, possibly, from the circumstance that a legacy of 200*l.* is afterwards given *seriatim* to each of the same legatees. This, however, is mere conjecture, and is not a ground upon which to rely.

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BRIDGE v. BRIDGE.<sup>1</sup>

June 29 and November 4, 1852.

*Voluntary Settlement—Equitable Assignment—Notice to Trustees.*

A, being equitably entitled to a freehold estate, and also to certain stocks and shares in public companies standing in the names of the trustees of his uncle's will, which were to be transferred to him absolutely on his attaining the age of twenty-five years, before that time arrived executed a voluntary settlement, whereby he assigned all his interest to certain new trustees, of whom he constituted himself one, upon certain trusts, and gave notice of the deed to the trustees of the will. Some of the shares were transferred to the new trustees:—

*Held*, that notwithstanding the notice, the court would not enforce the voluntary settlement either as to the real or personal estate, except with respect to those shares which had been actually transferred.

JOHN BRIDGE, the uncle of the plaintiff, by his will, dated the 27th

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<sup>1</sup> 16 Jur. 1031.

Bridge v. Bridge.

November, 1833, gave one fifth part of certain houses in London, and a freehold estate in Dorsetshire, to the defendants, Thomas Bridge, Robert Bridge, and Alfred Charles Bridge, upon trust to apply a sufficient part of the income towards the maintenance and education of the plaintiff until he should attain the age of twenty-five years, and to accumulate the residue, and pay the same to the plaintiff when he attained his age of twenty-five years; and the testator gave 1,500 shares in the General Mining Association, 150 Regent's Canal shares, and 150 Columbian bonds, among his five nephews, of whom the plaintiff was one, to be equally divided between them; and he gave all the residue of his estate and effects among such of his said nephews as should be living at his death, to be equally divided between them, but the share of the plaintiff not to be transferred to him till he attained the age of twenty-five years. The testator died in 1834. The plaintiff attained the age of twenty-one on the 10th February, 1846, when the accounts of the estate were submitted to him by the executors, and approved by him. Shortly after that time he married, but in the same year was separated from his wife. On the 9th April, 1847, after the separation, he executed a voluntary settlement, whereby he was expressed to convey and assign all the real and personal estate to which he was then, or might thereafter become, entitled under his uncle's will, to John Edward Bridge, Alexander Gordon, and himself, upon trust for himself during his life, and after his death for his children; and in default of issue, upon trust for such persons as he should appoint by will; and in default of such appointment, upon trust for his next of kin. The deed also contained a power to the trustees, at the request of the plaintiff, to raise the sum of 10,000*l.*, and pay it to him in such manner as they might think fit. The plaintiff had made a provision for his wife by a separate deed. He attained the age of twenty-five years on the 10th February, 1850. At that time his share of his uncle's personal estate consisted of 300 General Mining Company shares, 20 Regent's Canal shares, 30 Columbian bonds, 12,694*l.* consols, and 2,006*l.* cash. Notice of the settlement of 1847 was given to the executors, and the shares in the General Mining Company and in the Regent's Canal were subsequently transferred into the names of the trustees of the settlement; but the Columbian bonds, the money in the consols, and the cash at the bankers still remained in the names of the executors of John Bridge. There being no children of the marriage, and no probability of the plaintiff and his wife living together again, the plaintiff applied to the trustees of the deed and the executors of his uncle's will to retransfer the property to him, and, on their refusal, filed his bill, praying an account of the effects of the testator remaining unsold, and that the indenture of the 9th April, 1847, might be declared not to be binding on the plaintiff, and that the property to which he was entitled under the will might be transferred to him.

*Roupell, Q. C., Lloyd, Q. C., and Southgate*, for the plaintiff. This is not the common case of a man seeking to set aside his own deed. The plaintiff comes to the court to enforce the trusts of his uncle's

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Bridge v. Bridge.

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will. The court will not enforce a voluntary settlement unless it either creates a trust or is a perfect transfer. This settlement is neither. The notice to the executors did not constitute them trustees.

[Sir J. ROMILLY, M. R. Notice is of very little use, except in giving priority over incumbrancers.]

There should have been an acknowledgment of the trust by the executors. *Beatson v. Beatson*, 12 Sim. 281; *Antrobus v. Smith*, 12 Ves. 39; *Searle v. Law*, 15 Sim. 95; *Ward v. Audland*, 8 Beav. 201; *Sloane v. Cadogan*, Sugd. V. & P. 1119, 11th ed.; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Fortescue v. Barnett*, 3 My. & K. 36; *Barnard v. Young*, 17 Ves. 44; *Meek v. Kettlewell*, 1 Hare, 475; *Dillon v. Cooper*, 4 My. & C. 647.

*K. Parker*, Q. C., and *Sandys*, for the trustees of the settlement. No man can have the aid of equity to set aside his own deed. *Johnson v. Legard*, 3 Mad. 302. There was a good trust created by the settlement. In *Beatson v. Beatson* there was no contract; but here there is a contract with the trustees, which the court will enforce. *Ex parte Pye*, 18 Ves. 146; *Fletcher v. Fletcher*, 4 Hare, 67; *Petre v. Espinasse*, 2 My. & K. 496; *Blakely v. Brady*, 2 Dru. & W. 311; *Kekewich v. Manning*, 1 De G. Mac. & G. 176; s. c. 12 Eng. Rep. 120. The plaintiff, by naming himself as one of the trustees of the settlement, has created a trust in his own person, by which he is bound.

*R. Palmer*, Q. C., and *Macnaghten*, for the executors of John Bridge's will.

*Allnutt*, for the wife of the plaintiff.

*Grove*, for the other nephews of the testator.

*Chandless*, Q. C., for the plaintiff's mother, his next of kin.

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*Roupell*, Q. C., in reply, cited *Colman v. Sarrell*, 1 Ves. jun. 50; *Bill v. Cureton*, 2 My. & K. 503; and *MFadden v. Jenkins*, 1 Phil. 153.

Nov. 4. Sir J. ROMILLY, M. R., after stating the facts of the case, said that he must consider the plaintiff concluded by the settlement of accounts on his coming of age, and must treat his share in the testator's estate as ascertained. The only question for his decision was, what was the effect of the settlement of the 9th April, 1847. The plaintiff asserts that it is void *in toto*; the defendants contend that it is binding, at least with respect to the funds which have been already transferred. The principle on which the court acts in dealing with voluntary settlements is clear, but the cases are not easily reconciled. The rule is stated by Lord Eldon in *Ellison v. Ellison*. "I take the distinction to be, that if you want the assistance of the

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court to constitute you a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely conveyed the stock, &c., though it be voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this court." The rule so expressed had been repeatedly recognized, but there had been a diversity in the decisions with respect to what constitutes the relation of trustee and *cestui que trust*. There was very little difficulty in those cases, in which the donor had executed a bond or some other obligation for the payment of money, as in *Fletcher v. Fletcher*, 4 Hare, 67. The doubtful questions arose in cases where the donor professed to assign some previously existing chose in action. If the donor was himself the possessor of the chose in action, and executed a declaration of trust, he became a trustee, and the court would enforce the trust; but if he executed an assignment, but did not complete the transfer, then the court held that he had not done all that was necessary, and that the settlement still remained executory. So, again, if the fund, or other chose in action, was vested in trustees, and the donor assigned his interest, and gave notice to the trustees, and they acknowledged the interest of the assignee, there could be no doubt that they became trustees for him, and the court would give its assistance. But it was by no means settled what would be the course pursued by a court of equity in cases where no notice had been given to the trustees, or where they had done no act to acknowledge the creation of the trust. His honor then referred to *Fortesque v. Barnett*, *Sloane v. Cadogan*, *Meek v. Kettlewell*, *Antrobus v. Smith*, *Beatson v. Beatson*, and *Blakely v. Brady*; and remarked that the late case of *Kekewich v. Manning* was in some respects distinguishable from the earlier ones; but if the expressions there used were to have their full force, they would, he thought, be found in some measure irreconcilable with them. In the present case it was remarkable that the assignor did not attempt to make the executors, in whose hands the property was, trustees for the persons entitled under the settlement, but appointed new trustees for that purpose; and no transfer was effected, though there was no reason why that might not have been done. He attached no importance to the fact that the settler was himself one of the new trustees. On consideration of all the authorities, his honor was of opinion that the relation of trustee and *cestui que trust* was not created by the deed, in the absence of any transfer, and that the relation was not intended to arise until such transfer was effected. He was, therefore, of opinion that the shares in the General Mining Association, and the Regent's Canal shares, which had been duly transferred to the new trustees, were bound by the trusts of the deed; but that the Columbian bonds and the consols and cash were not bound by the trusts, and that the plaintiff was entitled to have them transferred to him. With respect to the freehold estate also, he thought that no trust was created; the settler had only an equitable interest



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in it till he attained the age of twenty-five, the legal estate in the meantime being in the trustees of John Bridge's will; and he could see nothing in the deed which could operate as a declaration of trust of this part of the property.

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WILKINSON v. STRINGER.<sup>1</sup>

November 12, 1852.

*Specific Performance — Evidence of Authority to Agent — Costs — Practice — Examination of Witnesses under the 15 & 16 Vict. c. 86, s. 39.*

Where the authority of the agent of the vendor was not sufficiently shown, a specific performance at the suit of the purchaser was refused, but, under the circumstances, without costs.

When an examination *visà vocis* of witnesses, who have already deposed by affidavit, is sought, under the 15 & 16 Vict. c. 86, s. 39, the test to try whether permission should be granted is to see whether, if the case had come on upon bill and answer, (a replication having been filed), the court would, under the old practice, have directed an issue. Unless an issue would have been directed, the examination will not be ordered under the new statutes.

THIS was a claim filed for specific performance of a contract for the sale of land at Camberwell, entered into under somewhat singular circumstances. A solicitor named Wildes, professing (as alleged by the plaintiff) to act as authorized agent on behalf of the defendant, Stringer, agreed to sell the land in question to a Mr. Martin, professing to act as agent for the plaintiff, Wilkinson. It afterwards turned out, that, in fact, Wildes had no authority whatever to sell the land, and that Martin had no authority whatever to buy it. But as, on examination, it turned out that the price was low, Wilkinson adopted the contract; while for the same reason Stringer repudiated it, denying Wildes's authority to bind him. By the affidavits it appeared that on the 4th February, Martin called on Wildes respecting some other purchase, upon which they came to no agreement; that then Wildes alluded to the land in question, not then for sale, but to be let on building leases. Martin said he would rather buy outright; and Wildes replied that that might probably be effected, and in effect, trusting to his influence with Stringer to procure the ratification of a contract he considered to be advantageous, then and there signed an agreement for the sale of the hereditaments to Martin for 7,000*l.*, representing to him (as he, Wildes, swore in his affidavit) that the sale must be ratified by the defendant, as he had no authority to effect this description of sale. Martin, on his side, was equally unauthorized to buy at that price on behalf of the plaintiff, who, however, afterwards adopted the contract. On the 5th February, Wildes

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<sup>1</sup> 16 Jur. 1033; 22 Law J. Rep. (N. S.) Chanc. 107.

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wrote to Stringer a letter, informing him of what had been done. This letter was lost, and of it Wildes had kept no copy nor entry, not intending to charge the defendant (who was a relative) professionally. Both Wildes and Stringer swore that it contained a statement of the contract which had been entered into, and that it was to be subject to the approval of the latter. Stringer sent no reply till the 13th February, when he informed Wildes that he would not sell, as he had been informed the land was worth more money. Wildes immediately informed Martin of this, but having still expectations of inducing Stringer to consent to what appeared to him to be an advantageous bargain, the refusal was not made known to Wilkinson till the middle of March, when he very shortly filed this claim for specific performance. Martin's affidavit in support of the claim did not directly contradict Wildes's as to the representations made on the 4th February of his authority to bind Stringer, nor did it go as to his belief concerning Wildes's authority, but only stated that nothing was on that occasion said by Wildes which induced him to believe that Wildes had no authority to sell the said land. On the 10th March, Wildes wrote and sent a letter to Martin, stating that he had not yet heard from Stringer, but that he had no doubt he would confirm the sale; and he swore, that happening to meet him on the same day, he stated as much to him *viva voce*. No notice of or objection to these expressions was taken. Wildes and Stringer both swore positively that Wildes never had any authority to sell to any person.

*Rolt* and *Bovil*, for the plaintiff, asked that if the court thought their case was not strong enough, Wildes and Stringer might be produced and examined.

*W. P. Wood* and *F. Webb*, for the defendant, *contra*.

*Rolt*, in reply.

Sir G. TURNER, V. C. The question which arises on this claim is, whether the agent was justified in entering into this contract to bind the vendor; and I am asked, if, on the evidence, I cannot make a decree for specific performance of the contract against the vendor, that I would, at least, make an order for the examination *viva voce* of the defendant and one of the witnesses, under the new Chancery Act for the Improvement of Equity Jurisdiction, so as to get further evidence as to the agency. The true test in such a case is, to consider whether such a case is made out, as that, if this suit had been commenced by bill, and the defendant had answered, and then the parties had gone into evidence, the court would have directed an issue to ascertain the fact of the agency, denied by the answer. If at the hearing, before the act, the court would not have directed an issue, it will not now direct the examination of witnesses upon the chance of what might come out; and therefore the question, to consider is, whether there is a reasonable case made in favor of the likelihood of

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establishing the authority. Now, putting out of consideration the case as between Wilkinson and Wildes, if Wildes himself had been the vendor, and looking at it as between Wilkinson and Stringer, what foundation of a case has been established? The utmost is this — that Wildes has represented himself to be the agent of Stringer. But this is denied; and the representation by Wildes could not be binding on Stringer. Then, in the circumstances surrounding the case, what is there to warrant me in making a decree against Stringer, on the assumed agency of Wildes? The only circumstance is the non-production of that letter of the 5th February, which Wildes wrote to him, and which has been lost. But it is positively sworn that that letter stated the agreement to have been entered into subject to the approval of Stringer; and it is a circumstance strongly confirmatory of the truth of the representation made by the plaintiff of the contents of that letter, that Stringer was, after the receipt of it, in communication with other persons on the same matter, namely, the subject of the disposition of this very property. How could this be, unless he were under a persuasion that he was in a position to repudiate the contract which had been entered into by Mr. Wildes? In that letter of the 13th February he speaks of selling this same land to other parties for 8,000*l*. The facts therefore confirm the representation made by Mr. Wildes and Mr. Stringer, that there was in this lost letter of Mr. Wildes a qualification submitting the contract to the approval of Mr. Stringer. But, in addition, it appears that on the 10th February, Mr. Wildes wrote that letter to Martin, as the agent of Wilkinson, in which he says he has no doubt of obtaining Mr. Stringer's confirmation of the sale; and then, on the evening of the same day, there was that conversation, in which the same thing was mentioned and acquiesced in by Martin; and Martin does not contradict this. But then, on the receipt of such a letter, or upon such a conversation as that, why did not Martin immediately say, "What have I to do with Mr. Stringer's confirmation? What is it to me whether he confirm the sale or not? You represented yourself to me as his agent, fully authorized. I accepted you as such agent, and Mr. Stringer is bound by your agreement. I know nothing of any confirmation being necessary." That, however, was not the course which he adopted; but instead of this, although, by the agreement of the 4th February, the contract was to be completed on the 25th March, there was no application for the delivery of the abstract, nor any step whatever taken towards completion, until long after the repudiation of the contract was known to the plaintiff or his agents. The plaintiff, if he wished to treat the objection of the defendant as a nullity, ought to have done so at once. I think, therefore, that this is not a case in which, on bill and answer, and a replication filed, the court would have felt it necessary to direct an issue; and therefore there will be no examination of witnesses *viva voce*, as asked by the plaintiff. The claim must be dismissed; but, looking to the circumstances under which the contract was entered into, I shall dismiss it without costs.

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 Whittington v. Corder.
 

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*Roll* asked, if the claim were dismissed, that it might be without prejudice to any bill to be filed by the plaintiff.

Sir G. TURNER, V. C. I think I ought to dismiss this claim without giving the plaintiff liberty to file a bill. Since the new act of parliament, I could, in a proper case, order the witnesses to be examined, rather than put the parties to the expense and delay of filing a bill; and if, in this particular suit, a case had been made, which in my judgment there has not, I could have examined them in this court, as there would have been but one single issue to be tried, namely, that of agency; and such an issue is a fit subject for such an examination.

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WHITTINGTON v. CORDER.<sup>1</sup>

November 12 and 13, 1852.

*Specific Performance — Lease — Parcels — Pleading — Contents of Claim.*

"Occupation under a lease" means occupation of all that passed under the lease, whether in actual enjoyment and use or not, and whether known to exist at the time of the lease or not; and therefore a cellar under certain demised premises was held to be in the "occupation of the lessee under the lease," although the tenant of the neighboring tenement was in the actual use of such cellar.

*Semble*, a claim ought to set forth such facts as are necessary to bring forward the real point at issue between the parties.

This was a claim for specific performance of an agreement for purchase of a house and premises at Chepstow. The plaintiffs, Whittington and Vaughan, were mortgagees in the property, and were now selling under their power in the mortgage deed. The mortgagor, Fowler, occupied one of the houses in the mortgage property. In 1847, he had demised the adjoining house to the defendant, Corder, for twenty-one years. Soon afterwards, he had discovered an old cesspool, totally unoccupied, and extending both under the house occupied by himself and that occupied by Corder. Fowler made an entrance into this cesspool from the house in his own occupation, and used the whole of it as a cellar. There was no communication between it and the house which had been demised to Corder. Fowler afterwards executed a mortgage, with power of sale of both the houses, together with other property, to the plaintiffs. Default being made in payment of the mortgage debt, the plaintiffs caused the property to be put up for sale by auction on the 26th August, 1851, under the following description:—"Lot 2. Dwelling house and shop, No. 9, Rodney-place, now in the occupation of Mr. John Corder,

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<sup>1</sup> 16 Jur. 1034.

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*Whittington v. Corder.*

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as tenant, under the annual rent of 150*l.*, under a lease for twenty-one years from Lady-day, 1847. The house contains good dining, drawing-rooms, four bed-rooms, and two attics." "Lot 3. All that shop immediately adjoining lot 2, with a large cellarage under ground. Part of this lot is now occupied by Mr. Cordeaux; the remainder is in the occupation of Mr. Thomas Fowler." At the sale Corder purchased the premises in lot 2, described as being in his own occupation under the lease of 1847. On the 28th he opened an entrance from his own house into the cellar directly underneath, and raised a brick partition between the portion under his premises and the portion under the adjoining house. The vendors contesting his right to this cellar, he refused to complete without a conveyance of it; and the vendors filed the present claim to enforce the contract.

*Russell and J. H. Palmer*, for the plaintiffs, the vendors.

*Berry*, for the defendant.

*Russell*, in reply.

*Doe v. Burt*, 1 T. R. 701, was the only case cited.

Sir G. TURNER, V. C. The facts lie in small compass. The defendant is the lessee under Fowler, under a lease for twenty-one years, from the 25th March, 1847, of a house and premises at Chepstow. Underneath this house and premises there is an old cesspool, formerly used for the drainage of the roads. It is nowhere stated in the affidavits that the cesspool was in use, and it seems quite clear that the existence of it was unknown to the parties at the time of the lease. The demise in 1847, being of the house and premises, the question is, what passed under that demise? I have no doubt that the cesspool did pass. I take it that a demise of the surface amounts to a demise of all that lies above, and also of all below, the surface. The test is, could a man, after having demised the premises in these terms, enter and dig? For example, if a mine existed under the land unknown to both parties, could the landlord, after the demise, enter, and dig and search for minerals, without the consent of the lessee? The case of *Doe v. Burt*, 1 T. R. 701, was much relied upon by the plaintiffs, but I think it does not apply, because there the cellar was not only known to exist, but was actually in the occupation of a third party at the time of the demise. At the time of this demise, however, the cesspool in question was walled in, and, though under the premises, was not in the use or occupation of any person—in fact, was not known to exist. It was in 1848, that Fowler, being the owner of the adjoining land, in building a house on it, struck the arch of the cesspool, which he then for the first time had any knowledge of. He immediately proceeded to convert it to his own uses, and did make use both of that part which was under his own land, and also of that under the defendant's, by making it into a sump. There can be no doubt this appropriation was unwarrantable, if the cesspool in question

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was included in the demise to the defendant in 1847. On the 26th August, 1851, a sale by auction took place.

[His honor read the description and particulars of the sale already set out.]

The first question is, what is the meaning of a person being in occupation of property under a lease? Is it to be said that a man is not in occupation under a lease of property comprised in that lease unless he be actively using and enjoying it? I apprehend that the true meaning of the words "occupation under a lease," is not actual personal use and occupation, but occupation to which he is entitled under the instrument by which the right of possession was granted; and therefore, on the true interpretation, what was put up for sale was all the property included in the lease; and this, as I have already stated, in my opinion, comprised the cellar in question.

[His honor then noticed some abortive negotiations that had been entered upon, and counsel's opinion which had been taken, and reference to arbitration, and continued:]

I am not here to say whether the advice so given was sound or not, but merely notice these matters as indicating what the feelings of the parties were on their alleged rights. Then looking at the fact that the plaintiffs felt they had fallen into a mistake, as appears by the mandamus in question, and to the fact that the defendant swears he would not have bought had he not expected to have possession of the cellar, I do not think this is a case for exercising the discretionary power of the court, and directing a specific performance; but I shall leave the parties to their remedies at law, if they cannot agree, as I most strongly recommend them to do. But looking to the whole case and particularly to the nature of the affidavits which have been filed, I shall mark my sense of those affidavits by giving no costs on either side. It is a most inconvenient and improper mode of bringing a case to an issue, that the defendant should have no idea, from the claim, of the case intended to be made against him.

*Russell* assured his honor that such was always the case on claims, and that the inconvenience was generally felt of the plaintiff's real case never being known until his affidavits were filed.

Sir G. TURNER, V. C. I think it is a great pity. Here the plaintiffs well knew that the whole point in dispute was whether this cellar was or not included in the contract, but the claim is filed as if it were the ordinary case of a claim for specific performance of a contract, the validity of which was denied. I do not mean to make these observations upon this claim in particular, but to guard the court against this claim being made into a precedent.

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WINCH v. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY & others.<sup>1</sup>

May 27, 28, and 31, 1852.

*Parties — Agreement between Railway Companies ultra vires.*

An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them, nor accepted by the other company, without the authority of parliament, and equity will grant an injunction to prevent the performance of such an agreement.

Though a railway company are not bound to be carriers on their own railway, they are bound to work the line; and the 87th section of the Railways Clauses Consolidation Act does not authorize one company to do more than carry part of their traffic, where that is necessary, upon the line of another company.

An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement.

Where there is an agreement between two railway companies, which is beyond the powers of both, and against the policy of their acts of parliament, a shareholder in one of the companies may file a bill, on behalf of himself and all the other shareholders therein, against his own company and the other company, for an injunction to restrain the execution of the agreement, and without making either the directors of the former company, or the shareholders therein who promoted the agreement, or any of them, defendants to the suit.

On the 15th October, 1851, the following agreement was entered into between the Great Western Railway Company, the Shrewsbury and Birmingham Railway Company, and the Shrewsbury and Chester Railway Company of the one part, and the Birkenhead, Lancashire, and Cheshire Junction Railway Company of the other part:—  
 “The associated companies are to have the right of conveying any traffic over the Birkenhead, Lancashire, and Cheshire Junction Railway until an act shall be obtained for the purpose of authorizing a lease of that railway to the associated companies, provided such act can be obtained after two *bond fide* applications to parliament in the years 1852 and 1853, the associated companies paying, in respect of the traffic which shall pass over any part of either of the lines of the associated companies to or from the Birkenhead, Lancashire, and Cheshire Junction Railway, 60l. per cent. of the sum which may be actually received from the rates which they shall fix and charge for the conveyance of such traffic over the last-mentioned railway; provided always, that for the traffic which may pass to or from places north of Shrewsbury only, the 60l. per cent. shall be allowed and paid on the rates which may be fixed by the Birkenhead, Lancashire, and Cheshire Junction Railway Company, but not exceeding the rates at present agreed between the company and the Shrewsbury and Chester Railway Company; and in respect of any local traffic arising upon the Birkenhead line carried by the associated company, but not passing

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over any portion of the lines, 75*l.* per cent. of the receipts and payments for the conveyance of it, the Birkenhead local rates being charged for such last-mentioned traffic. The Birkenhead, Lancashire, and Cheshire Junction Railway Company are to give the associated companies all the rights, conveniences, and accommodations of their line, stations, offices, sidings, sheds, warehouses, and watering-places, &c., and are to incur every charge or expense incidental to the use of them, and to the rights of passing over the railway, excepting only the use of locomotive power, carriages, wagons, or movable stock, which are to be provided and employed by the associated companies for the conveyance of such traffic as they may bring or convey, and for which latter service the difference between the 60*l.* per cent. or 75*l.* per cent., (as the case may be), and the full receipt, is to be deemed to be the remuneration. If the Birkenhead Company shall be required to perform any terminal duties in respect of any traffic, they are to be separately paid, for the Birkenhead Company, a reasonable rate, to be fixed. As soon as the said act shall be obtained, a lease of the Birkenhead Railway shall be completed, and all their property and plant, whether fixed or movable, (excepting only some surplus land and buildings shown on a plan to be annexed hereto), are to be transferred to the associated companies; and this agreement shall be held (subject to the parliamentary powers being obtained) to secure the Birkenhead Company 3*l.* per cent. on the capital of 2,000,000*l.* sterling, as a fixed and guaranteed rent for their line, and all their said property, plant, &c., and for all the traffic, revenues, &c. of their company, from whatever source derived — the said rent becoming payable from the 1st July, 1852, and to continue payable half-yearly until the 30th June, 1854, after which latter period 3*l.* 10*s.* per cent. on the same capital is to become in like manner payable for one year, namely, to the 30th June, 1855, and afterwards 4*l.* per cent. per annum in perpetuity on the same capital. The Birkenhead Company are to have the option, at any time after the amalgamation of the three companies, and before the 1st January, 1856, to amalgamate at par their fixed capital of 2,000,000*l.* sterling with the amalgamated capital of the three companies, the same to be in substitution for and in lieu of the fixed rent thenceforth payable or referred to in this agreement, they having six months' notice of such wish to amalgamate, and provided the act of parliament shall have conferred upon them such power of amalgamation. An act of parliament to authorize the said lease and amalgamation is to be applied for in the ensuing session, 1852, and again, in case of need, in the subsequent session, 1853; and every exertion is to be made *bonâ fide* by all the companies, parties hereto, to carry the said act, and obtain all requisite powers and authorities for the same object. Neither company shall directly or indirectly make any arrangements or agreements to do any act which shall interfere with, or prejudice, or be inconsistent with the rights and privileges which are the subject matter of this agreement, or with the future lease and possession of the Birkenhead, Lancashire, and Cheshire Junction Railway. A more formal agreement is to be drawn up, and submitted for confirmation by the share-



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holders of the Birkenhead, Lancashire, and Cheshire Junction Railway Company, in which agreement powers of arbitration shall be contained to settle and determine all matters which may be in difference between the several companies parties to this agreement. The Birkenhead, Lancashire, and Cheshire Railway Company agree to communicate to the associated companies, and to assign, as far as they have power to do so, all rights, privileges, and benefits enjoyed by them in virtue of any existing agreements with other companies or parties.

"Paddington Station, Oct. 15, 1851.

"Approved on behalf of the Great Western Railway Company.

"THOMAS WILLIAMS.

"CHARLES A. SAUNDERS.

"Approved on behalf of the Shrewsbury and Chester Railway Company.

"ROBERT ROY.

"Approved on behalf of the Shrewsbury and Birmingham Railway Company.

"JOSEPH WALKER.

"Approved on behalf of the Birkenhead, Lancashire, and Cheshire Junction Railway Company.

"JAMES BANCROFT.

"WILLIAM GIBB.

"JAMES BROWN."

On the 1st November, 1851, a meeting of the shareholders of the Birkenhead, Lancashire, and Cheshire Junction Railway Company was held, and at such meeting the said agreement of the 15th October, 1851, was submitted in the ordinary way to the shareholders, and with reference thereto they passed two resolutions, which, so far as material, were as follows:—"Resolved, that the memorandum of agreement with the Great Western and Shrewsbury Companies, dated the 13th October, 1851, be confirmed and ratified." "Resolved, that the directors of Birkenhead, Lancashire, and Cheshire Junction Railway Company be specially empowered to ratify and confirm, by affixing the common seal of the company to any extension of agreement with the Great Western and Shrewsbury Companies, in like manner as if such extended agreement had been submitted to a meeting of proprietors of this company." Notices for a bill were afterwards issued, and the bill itself was prepared and printed, and deposited. The head and title of such bill was—"A bill for the lease of the undertaking of the Birkenhead, Lancashire, and Cheshire Junction Railway Company to the Great Western, the Shrewsbury and Birmingham, and the Shrewsbury and Chester Railway Companies, or to the Great Western Railway Company and either of the said last-mentioned companies, and for the amalgamation, in

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a certain event, of the said undertaking with the undertakings of the said three last-mentioned companies, and for other purposes." The said bill was before a committee of the house of commons for consideration, but owing to a difference between the Birkenhead Company and the said three other companies, a resolution of a meeting of shareholders of the Birkenhead, Lancashire, and Cheshire Junction Railway Company was passed, purporting to require their directors not to proceed with the bill, so far as that company was concerned. The bill, however, was not withdrawn. An advertisement was issued at the end of April, 1852, by the Birkenhead Company in the following words:—

"Notice is hereby given, that a special general meeting of the shareholders of the Birkenhead, Lancashire, and Cheshire Junction Railway Company will be held at the Monks Ferry Hotel, in Birkenhead, in the county of Chester, on Tuesday, the 18th May next, at one o'clock in the afternoon, for the purpose of considering and approving or otherwise of a certain bill now before parliament, intituled 'A bill to consolidate into one act, and to amend the provisions of the several acts relating to the Birkenhead, Lancashire, and Cheshire Junction Railway Company,' to authorize the construction of new works, to define the undertaking of the company, and for other purposes; and also for the purpose of considering and approving or otherwise of an agreement for the working of the railways of the Birkenhead, Lancashire, and Cheshire Junction Railway Company by the London and Northwestern Railway Company, and for other purposes.

"Dated the 29th April, 1852.

"By order,

"JOHN GIBSON, Secretary.

"Railway office, Birkenhead."

On the 15th May, 1852, the said advertisement was again repeated, with the following memorandum annexed:—

"Birkenhead, May 15, 1852.

"Sir, — I am instructed to inform you, that, owing to parliamentary arrangements requiring the attendance of the directors in London on the 18th instant, the above meeting will be opened *pro forma*, and adjourned to Friday, the 21st May instant, to be held at the Monks Ferry Hotel, Birkenhead, at one o'clock in the afternoon.

"I am, your obedient servant,

"JOHN GIBSON, Secretary."

A meeting of the shareholders of the said Birkenhead Company was held on the 18th May, 1852, and adjourned, according to the said memorandum, to Friday, the 21st May. The following were the heads of the agreement referred to in the advertisement:— "Heads of a proposed agreement between the Birkenhead, Lancashire, and Cheshire Junction Railway Company and the London and North-

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western Railway Company. The London and Northwestern Railway Company, for a term of ninety-nine years, to work the lines of the Birkenhead Company, using the property and plant of the latter company, except the lands and buildings specified in the first schedule. The London and Northwestern Company to run as many trains as the traffic of the Birkenhead Company shall from time to time require, not fewer than are at present, at fares and rates to be fixed by the Birkenhead Company, it being understood that for through traffic the fares and rates shall be the same as those charged by the London and Northwestern Company to and from the same places. The sum to be allowed the London and Northwestern Company for working expenses, including passenger duty, maintenance, and depreciation of way, works, and plant, and general charges, to be such proportion of the gross receipts as similar expenses of the whole railways of the London and Northwestern Railway bore to the gross receipts on such railways the preceding half year, a proportionate allowance to be made to the London and Northwestern Railway Company on account of traffic carried over the lines of the Birkenhead Company by other parties. The traffic of the Birkenhead Company, for the purposes of this arrangement, to include (or the Birkenhead Company shall be credited in respect of their mileage shares as if it included) the traffic, if any, carried by the London and Northwestern Company to and from Shrewsbury, and places west, north, and northwest of Shrewsbury, (including the traffic passing over the Holyhead Railway, or any railway or branch railways now or hereafter belonging to or connected therewith), to and from Manchester, to and from Shrewsbury and the places aforesaid, and Liverpool, and Birkenhead, (which two latter towns, for the purposes of this clause, are to be considered identical), and to and from Shrewsbury and the places aforesaid, and the several railways uniting with the lines of railway of the London and Northwestern Company at Liverpool and Manchester, or any intermediate places between Liverpool and Manchester. The property and plant of the Birkenhead Company to be valued and restored at the termination of the agreement, of the same working value. The line between Chester and Birkenhead to be put into an efficient state of repair by the Birkenhead Company. Provisions for accurate returns of traffic and inspection of books and accounts. Existing traffic not to be reduced. Applications to part of needful appointment of joint committee, but not to possess or exercise powers inconsistent with the acts of parliament of the respective companies. Nothing in proposed agreement to affect the existing agreements, but same only to be suspended during the existence of the proposed agreement. Nothing in proposed agreement to affect or prejudice the powers, rights, and privileges of the Shrewsbury and Chester Company contained in that company's act of parliament, passed in the session of 1851. The usual provisions for referring differences to arbitration."

The bill in this suit was filed by Henry Winch, on behalf of himself and all the other shareholders in the Birkenhead, Lancashire, and Cheshire Junction Railway Company, against the

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said Birkenhead Company and the London and Northwestern Railway Company, the Great Western Railway Company, and the Shrewsbury and Chester Railway Company, as defendants. After setting forth the above facts among others, the bill went on to state that the majority of the directors of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company were prepared to authorize the sealing of the said proposed agreement, and that they had the seal of the said last-mentioned company in their power and under their control, and that the plaintiff could not obtain the possession thereof, or institute that suit in the name of, or by the authority of, the said last-mentioned company; that the said proposed agreement was illegal, and a fraud upon the said agreement of the 15th October, 1851, and beyond the power of the Birkenhead, Lancashire, and Cheshire Junction Railway Company on the one hand, as well as of the London and Northwestern Railway Company on the other, and that the effect thereof would be and was to place the lines of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company, and the property and plant thereof, completely in the hands and under the control of the London and Northwestern Railway Company for ninety-nine years, and to transform the said Birkenhead, Lancashire, and Cheshire Junction Railway Company into an undertaking materially at variance with that in which the plaintiff and the other shareholders became interested as shareholders; that the Birkenhead, Lancashire, and Cheshire Junction Railway Company, unless restrained, would make over their lines, property, and plant to the London and Northwestern Railway Company upon the footing of the said proposed agreement, although they had no authority so to do; that the shareholders of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company, whereof plaintiff was one, and duly registered as such, exceeded one thousand in number, and the said shareholders were so many, and their interests so liable to changes, that it would be utterly impossible to make them all parties to that or any suit. And the bill charged that each of the defendants alleged that the others of them were necessary parties to this suit; and the said London and Northwestern Railway Company claimed to have and had an interest in the matters in the question therein; and that they, acting in collusion with the said Birkenhead, Lancashire, and Cheshire Junction Railway Company, and acting upon the said proposed agreement, threatened and intended to possess themselves of the lines of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company, and of the plant and property thereof; that it was intended to hand over the property, plant, and lines of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company to the said London and Northwestern Railway Company on Friday, the 21st, or Saturday, the 22d instant, in pursuance of the said agreement, which would be submitted to the said meeting on Friday, the 21st instant, and executed, unless the court interfered, as was thereby sought; that those who had the management of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company had prepared and threatened to carry out the said

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agreement, and that they alleged that they had been or would be authorized to do so by some vote of the majority of the shareholders of the said company, whereas any such vote was wholly beyond the powers of any number of the shareholders thereof, and no majority of the shareholders thereof could give lawful authority for the execution and carrying out of the terms of the said proposed agreement. The bill prayed that the defendants, the Birkenhead, Lancashire, and Cheshire Junction Railway Company, their directors, officers, and agents, might be restrained by injunction from [putting their seal to, or otherwise executing, or causing, or permitting the execution of, the proposed agreement in the bill mentioned, or any agreement comprising the terms of the said heads of the proposed agreement, or any material parts of such terms, and from acting on the footing of or in accordance with the said proposed agreement; and that the said Birkenhead, Lancashire, and Cheshire Junction Railway Company, their directors, officers, and agents, might likewise be restrained by injunction from] making over to the said London and Northwestern Railway Company their, the said Birkenhead, Lancashire, and Cheshire Junction Railway Company's lines of railways, plant, or property, or any part or parts thereof, upon the footing of the said proposed agreement, [or otherwise]; and that the said London and Northwestern Railway Company, their directors, servants, and agents, might be restrained by injunction from taking possession of the said lines of railway, plant, and property, [as proposed and threatened or otherwise]. The bill was supported by affidavits, and the affidavits in opposition did not deny the material facts, nor the charge that it was intended, on the 21st instant, to hand over the lines, property, and plant of the Birkenhead, Lancashire, and Cheshire Junction Railway Company to the London and Northwestern Railway Company. On the 20th May an interim injunction was granted in the terms of the prayer, to extend over the 24th May. The London and Northwestern Railway Company demurred to the bill, on the several grounds of want of equity; that the plaintiff and the several persons on whose behalf he sued had not a common interest in the subject-matter of the suit; that the directors of the Birkenhead, Lancashire, and Cheshire Junction Railway Company, or the majority of them, were not made parties to the suit; and also that none of their shareholders, who were desirous that the acts sought to be restrained should be done, were made parties. There was also a motion for an injunction in the terms of the prayer.

*Bacon, Follett, and J. V. Prior*, for the demurrer, contended that the agreement in question was a simple agreement for working the line, and not, as in *Beman v. Rufford*, 1 Sim. (N. S.) 550; s. c. 6 Eng. Rep. 106, to exercise any of the rights of the company; nor was there here, as in that case, any thing like a partnership between the companies, or a lease from one company to the other. If there were any thing in the agreement which could not be performed without an application to parliament, then it was simply an agreement to apply to parliament for the necessary powers. But the Birkenhead Company were

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not bound to become carriers on their own railway; they might engage with any one to perform that duty for them, and therefore it was perfectly competent to them to enter into this agreement, and it was legal. The objection that the London and Northwestern Company could not enter into the agreement, if a good objection, could not be listened to from the plaintiff, who had no interest in that company. They further argued, that, as the bill proceeded on the footing of the first agreement being legal, it could not be supported that the frame of the suit was wrong, the bill being by one on behalf of all the shareholders in the company, not excepting, as it should have done, those who were doing or had acquiesced in the acts complained of, as in *Beman v. Rufford*, (*ubi sup.*) and *Graham v. The Birkenhead Railway Company*, 2 Mac. & G. 146.

[Sir J. PARKER, V. C. The minority of the shareholders, or one of them, according to those cases,<sup>1</sup> may file a bill on behalf of the whole body, though at a meeting a large number may have sanctioned the act, if it be illegal; if not, it would be impossible for a shareholder in such a case to obtain relief that does not apply to the other part of the objection, that the directors are not made defendants.]

The bill proceeds on an allegation, that a majority of the directors are prepared to authorize the execution of the agreement, and have the seal under their control, and that the plaintiff cannot obtain possession of it. These directors, therefore, ought to have been made defendants, but the plaintiff, suing on their behalf, and alleging a breach of duty on their part, seeks to have this breach of duty restrained. They ought to be brought before the court as defendants, if it were only to give them an opportunity of making an explanation. Then the London and Northwestern Railway Company were improperly made parties. That they were not necessary parties was shown by the case of *The Shrewsbury and Chester Railway Company v. The Shrewsbury and Birmingham Railway Company*, 1 Sim. (N. S.) 410; s. c. 4 Eng. Rep. 171, in which they were not made parties, although the relief asked was to prevent the defendant company from entering into an engagement with them. The case was one of a mere internal arrangement, and the proper mode of determining it would be to take the voice of a general meeting of shareholders, at which the decision of the majority on such a question would be binding. *Mozley v. Alston*, 1 Ph. 790; *Foss v. Harbottle*, 2 Hare, 461; *Lord v. The Copper Miners Company*, 2 Ph. 740.

*Rolt, Emsley and Giffard*, for the bill, relied only on showing that the agreement was illegal; that it was beyond the powers of the Birkenhead and London and Northwestern Companies, and could not be rendered valid by the sanction of every one of their shareholders. The case fell precisely within *Beman v. Rufford*, (*ubi sup.*) The scope of the agreement was, that the London and Northwestern Company should work the Birkenhead line, not that they should take

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<sup>1</sup> See the judgment of Lord Cranworth, 1 Sim. (N. S.) 564; 6 Eng. Rep. 107.

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any particular portion of the traffic, but should undertake the whole, and receive all the fares, and, after deducting certain expenses, should pay over the surplus to the Birkenhead Company. The object of the London and Northwestern Company was not to obtain any immediate profit, but to bring more traffic upon their own line. But in order to work the line, the company must determine the times of starting of the trains, must appoint the guards and all the officers and men, and maintain the railway; all which, by the 108th section of the Companies Clauses Act, are powers given by parliament only to the original company, and cannot be delegated. Under the 87th and 90th sections of the Railways Clauses Consolidation Act, the Birkenhead Company were not obliged to be carriers themselves; they might allow any person not a company to carry upon their line; but if they allow one, they were under an obligation to allow any other person who might desire to carry over their line; and they were bound to reserve to themselves the power of regulating the line and the traffic, which it was evident could not be done at all if they delegated to each person who wished to carry on their line a portion of such regulation. They must do so, however, if they gave such power to any one, and that would occasion great danger to the public travelling on the line. Then the plant was to be handed over; and in the same manner, if given to one set of carriers, they must allow others to have a plant of their own, as separate turn-tables, water-tanks, &c., which would be most inconvenient, if not impossible. The London and Northwestern Company, moreover, had no right to use their capital for the purpose of being carriers on another line. As to the frame of the suit, the principle was, that all or any one of the shareholders in a company may sue, to prevent the company from doing an act *ultra vires*; and there was no reason for making any of the directors parties, because no relief was sought against them personally, and the acts of the directors were the acts of the company. *Bagshaw v. The Eastern Union Railway Company*, 7 Hare, 114; s. c. 2 Mac. & G. 389. This was the proper form of asserting a common right in all the shareholders against the corporation, which for this purpose had a separate existence, distinct from the whole body of shareholders. *Mozley v. Alston*, (*ubi sup.*); *Bromley v. Smith*. 1 Sim. 8; *Preston v. The Grand Collier Dock Company*, 11 Sim. 327; *Coleman v. The Eastern Counties Railway Company*, 10 Beav. 1; *Ward v. The Society of Attorneys*, 1 Coll. 370; *Adley v. The Whitstable Company*, 19 Ves. 315.

*Follett*, in reply.

Sir J. PARKER, V. C., said that the question turned mainly on the construction of the agreement, in which the London and Northwestern Company had as great an interest as the Birkenhead Company. Before deciding any thing on the demurrer, his honor wished to hear the motion.

*Rolt*, *Elmsley*, and *Giffard*, for the motion, cited a case of *The Scot-*

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*tish Central Railway Company v. The London and Northwestern Railway Company*, (not reported).

*Bethell* and *G. L. Russell*, for the Great Western Railway Company, argued that the agreement in question was positively illegal, and was also a contravention of the previous agreement of October, 1851. They cited *Hitchins v. Congreve*, 4 Russ. 576.

*Daniel* and *Selwyn*, for the Birkenhead Company, argued that the application, being apparently by a shareholder in that company, but in reality being on behalf of the Great Western Company, was untrue, unfounded, and ought not to succeed; that this was a matter of internal arrangement, although it might require the sanction of parliament ultimately.

[Sir J. PARKER, V. C. According to my view of the bill, the material allegation, which is not denied, is, that the line, property, and plant of the Birkenhead Company are to be handed over to the London and Northwestern Company on the 21st instant, without the authority of parliament.]

That could not now be done; therefore the bill was premature.

[*Roll*. The interim injunction has prevented it.]

Sir J. PARKER, V. C. I read it after a meeting and resolution that is to be done. Is the Birkenhead Company willing to give an undertaking not to do so without the authority of parliament?

*Roll*. Lord Cottenham said that he would never accept the undertaking of a company.]

Such an undertaking would give a color of right to this bill, which ought never to have been filed. They cited *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, 2 Ph. 597; *Ware v. The Grand Junction Waterworks Company*, 2 Russ. & M. 570; *Hodgson v. Earl Powis*, 1 De G. Mac. & G. 6; s. c. 8 Eng. Rep. 257; *Cohen v. Wilkinson*, 12 Beav. 125, 138; 1 Mac. & G. 481; *Stevens v. The South Devon Railway Company*, 13 Beav. 48; s. c. 2 Eng. Rep. 138; *The Great Northern Railway Company v. The Eastern Counties Railway Company*, 9 Hare, 313; s. c. 12 Eng. Rep. 224; and *Haines v. Taylor*, 2 Ph. 209.

*Bacon*, *Follett*, and *J. V. Prior*, for the London and Northwestern Railway Company.

*Roll*, in reply.

Sir J. PARKER, V. C., said, that he could relieve the counsel from some part of the reply. With respect to the agreement, his honor was clearly of opinion—to say nothing as to that part of it which provided for an application to parliament—that the agreement was not within the powers of either of the companies at present. Parliament could give them powers, but as the agreement stood, his honor thought that they could not perform it with their present



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statutory powers. His honor wished only to know what form of injunction was asked with reference to the rest of the case.

*Rolt* said that all that was desired was, that this agreement should not be acted upon.

Sir J. PARKER, V. C. I do not say that an agreement is illegal which is an agreement for applying to parliament for these powers, or an agreement which is not to come into effect until they have got powers from parliament.

*Rolt* asked to restrain the use of the funds of the Birkenhead Company in making such application to parliament, and that they might be restrained from delivering up the property and plant unless and until the agreement should be sanctioned by parliament, and also from putting their seal to, or otherwise executing, or causing or permitting the execution of, the proposed agreement, or any agreement comprising the terms of the heads thereof.

Sir J. PARKER, V. C. The agreement contains a clause which would make it innocent. I should feel some difficulty in saying that they are not to put their seal to an agreement if it is that parliamentary powers shall be applied for to enable them to do that which cannot be done without such authority. If the company put their seal to an agreement which is illegal, there are means of preventing them from acting upon it.

*Rolt*, in continuation.

Sir J. PARKER, V. C. Here is an agreement, the object of which is, that the London and Northwestern Railway Company, for a term of ninety-nine years, are to work the line of the Birkenhead Company, using the property and plant of the latter company, except the land and buildings specified in the first schedule; and the property and plant of the Birkenhead Company is to be valued and restored at the termination of the agreement of the same working value. Now, as to the undertaking to work the line, as it appears to me, it is quite plain that the London and Northwestern Railway Company at least undertake all that part of the business of this company which is carried on upon the line of the railway. The agreement expresses that they are to run the trains, and refers to the working expenses — pointing out, therefore, that what is meant by working is the maintenance of the way, and making good the depreciation of the way, of the works, and of the plant. The company who work the other railway are to have the use of the property and plant of the other, and that must mean the exclusive use as between themselves and the Birkenhead Railway Company, because it is clear that if the London and Northwestern Railway Company are to work it under this agreement, the Birkenhead Company cannot work it, and they must part with the use of their property and plant, with the ex-

ception of some land and buildings, for the purpose of working it, to the other railway company. Now, I think that it is impossible that that can be carried out without delegation or transfer to the London and Northwestern Railway Company of some, at least, of the duties and powers which are given exclusively to the Birkenhead Company by their acts of parliament. It appears to me, although the Birkenhead Company are not at all bound to be carriers, that what is called working the line is a duty that is imposed by act of parliament upon them; and it appears to me, therefore, that the agreement is, that they shall part with certain statutory powers, which they have no authority to part with; and moreover, that they are to part with them to a body who, by their constitution, cannot accept them, for the London and Northwestern Railway Company, as I understand its constitution and objects, cannot, without further authority from parliament, undertake the working of another line of railway. It was contended, that if that had been a question of simple invalidity of the agreement, as regards the London and Northwestern Company, merely resolving itself into this, that the agreement is not mutual, it was for the Birkenhead Company to consider whether they would or not enter into an agreement which might go on for a certain time, but which could not be enforced. It seems to me, that it is not a question of simple incapacity on the part of the London and Northwestern Railway Company to undertake the working of this line, but that it is against the policy of these acts of parliament; and I think, therefore, that the agreement for making over this property to them is an agreement savoring of illegality, which any shareholder in the Birkenhead Company has a right to come to the court to restrain. I think it is impossible to say that the working of the line by the London and Northwestern Railway Company can be authorized by the 87th section of the Railways Clauses Consolidation Act, which merely gives them a limited power to run a portion of their traffic, where it is necessary for the purposes of their own traffic, over the other line; and I cannot distinguish an agreement of this kind from an agreement for a lease. It is true that a lease is not mentioned, but this agreement seems to me to have all the attributes and consequences of a lease, and it is not contended that a lease is within the powers conferred by these acts of parliament; so that it appears to me that further statutory powers are necessary to enable either the one company to part with, or to enable the other company to accept, the powers which it is proposed by this agreement to give over to them. Now, the agreement itself seems to contemplate this, for it says that there is to be an application to parliament, if needful. There is to be an appointment of a joint committee, but not to possess or exercise powers inconsistent with the acts of parliament of the respective companies. If the agreement were for an application to parliament for the necessary powers, or if it were an agreement not to be acted upon until the necessary powers have been obtained, it appears to me that it would be an innocent and a lawful agreement, and one with the execution of which the court would not interfere. It appears to me, not only on the allegations of this bill,

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but on the uncontradicted affidavits on which the court proceeds upon a motion of this kind, that there was an intention that this agreement should be acted upon without the authority of parliament, and before the authority of parliament should be obtained, if the shareholders agreed to it; and the statement in the bill is, that they were about to agree to it; and that at a meeting which was about to be held, there was no doubt that the shareholders would agree to this, and that it was immediately to be acted upon, by handing over the property and plant of the Birkenhead Company to the other company. I cannot doubt that if this bill had not been filed, that would have taken place on the 21st or 22d of this month. It is stated that there was the intention to do it, and that statement is not contradicted on the affidavits. Now, it is very true, that after an interim order had been made, the consideration of this has been adjourned; but still I do not find any thing in the affidavits disclaiming on the part of either company the intention of acting on this agreement, if the sanction of their shareholders is obtained, without waiting for the further sanction of parliament, which it appears to me to be indispensable they should have. Something has been said about the frame of the bill. I think that this bill is correctly framed by one on behalf of himself and all the other shareholders. It is not necessary to refer to any authority further than the very forcible language of Lord Cranworth in that case of *Beman v. Rufford*, (*ubi sup.*), in which he said that any one shareholder may come on behalf of all, to prevent what he calls an infringement of the law of the concern. I do not think it is necessary that the directors should be made parties. The act that is sought to be restrained is the act of the company. It is quite sufficient if there is an order restraining the company; the company itself cannot act except by means of its officers. It appears to me that the suit is properly framed by the relief being sought against the company alone. A good deal has been said about the former agreement between the other associated companies. That agreement is not in the same terms as this by any means; there are quite different observations applicable to them. There is no attempt to conceal here the interest which the Great Western Railway Company have in that other agreement. They are brought before the court to argue for that interest. I can see nothing in all that has taken place there to prevent Mr. Winch, who is a shareholder in this company, from coming and seeking to restrain an infringement of the constitution of this company as it is established by law. However, I do not think it is necessary to grant an injunction to restrain them from putting their seal to it—that part will take care of itself. If any agreement beyond their powers is executed, it will be time enough to come then and ask the court, on that additional fact, to act; but seeing that, upon this evidence, there was an intention, not disputed or contradicted, to act on this agreement, on obtaining the sanction of a meeting of shareholders, without going to parliament, I think the plaintiff is entitled to an injunction in the terms of his notice of motion, to restrain the Birkenhead Company from making over to the London and Northwestern Railway Com-

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 Smith v. Edwards.
 

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pany the Birkenhead Company's lines of railway, plant, or property, or any part or parts thereof, on the footing of the agreement, and that the London and Northwestern Railway Company may in like manner be restrained from taking possession of the said lines of railway, plant, or property, or any part thereof, on the footing of the agreement; and I overrule the demurrer.

*Follett.* Your honor does not express any opinion on the legality of the other agreement with the Great Western Railway Company.

Sir J. PARKER, V. C. I said that it is different in terms from the present. I do not say that it is a legal agreement.

The injunction was granted as asked, omitting the words in brackets, and adding the words "on the footing of the said agreement" at the end.

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 SMITH v. EDWARDS.<sup>1</sup>

November 4 and 9, 1852.

*Practice — Evidence under Stat. 15 & 16 Vict. c. 86.*

Cause ordered to stand over till a day named, to enable the plaintiff to prove that a defendant was out of the jurisdiction, which the other defendants objected was not sufficiently proved by the plaintiff's affidavit.

GLASSE and Lovell, for the plaintiff.

*Lee* and *Allnutt*, for two of the defendants, took an objection for want of parties; that there was no proof that a defendant alleged to be out of the jurisdiction was actually out of the jurisdiction, except an affidavit of the plaintiff to the effect: that in December, 1841, this defendant was about to proceed to Australia, and that the plaintiff believed he had then gone, and ever since had remained there, which they objected was not sufficient evidence.

*Glasse* and *Lovell* then asked that evidence of the fact might be taken under the 15 & 16 Vict. c. 86, by examining the plaintiff *vivâ voce* as to this point.

Nov. 9. STUART, V. C., having consulted with the other Vice-Chancellors, said that they agreed with him that the proper course would be to let the cause stand over until a day sufficiently distant to give the plaintiff a fair opportunity to prove his case in his own way. His honor, therefore, directed that it should stand over until the first cause-day in Hilary term.

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Langdale v. Gill; Jones v. Batten.

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LANGDALE v. GILL.<sup>1</sup>

November 24, 1852.

*Practice — 44th Order of the 7th August, 1852 — Supplemental Amendment.*

The court will not, on petition of a defendant, direct the plaintiff to enter upon record a statement of supplemental matters, under the above section.

THIS was a petition by C. E. Wood, a defendant to the suit, and her husband, and the trustees of her marriage settlement, for the payment of the dividends of a fund in court to the wife, C. E. Wood, for her separate use; and that the plaintiff might be directed to enter upon record in this cause such statement as might be necessary to record the marriage of "the said defendant and her husband," "and the nature and effect" of her marriage settlement. The dividends of the fund in court had been ordered to be paid to the defendant, C. E. Wood, by her maiden name during her life, or till further order, with liberty to apply. Since this order the defendant had married, and the fund had been settled by the settlement in question.

*Bovill*, for the petition, referred to the 44th order of the 7th August, 1852, and said that the direction asked was to save expense.

*Osborne*, contra, said that there was no abatement to the suit, and that the order asked was not necessary, and that the suggestion implied that the court should assume the existence of the marriage and the settlement.

STUART, V. C., said that he thought the order was not necessary, and that it would be a novelty to give to a defendant the means of amending the plaintiff's bill; the plaintiff was *dominus litis* to that extent certainly. The only order that could be safely made would be for payment of the dividends.

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JONES v. BATTEN.<sup>2</sup>

December 8, 1852.

*Practice under the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, s. 6.*

Where a written copy of a bill has been duly stamped and filed under the 6th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, the printed copy, if brought into

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Jones, v. Batten.

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the office within the fourteen days prescribed by that section, may be filed without having a stamp affixed.

THIS was an application that the clerk of records and writs might be directed to receive and file a printed copy of a bill for an injunction, a written copy of which, duly stamped, had been filed within the previous fourteen days, without requiring such printed copy to be stamped.

*Freeling*, in support of the application, said that, by way of exception to the requirement of the first section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, that all bills should be printed, the 6th section of the same act provides that the clerks of records and writs may receive and file a written copy of (amongst others) any bill of complaint praying a writ of injunction, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days, and that every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof. Again: by the 12th section of the Suitors in Chancery Relief Act, 15 & 16 Vict. c. 87, it is enacted, that no document, which, by any order to be made by the Lord Chancellor, shall be required to have a stamp impressed thereon or affixed thereto, shall be received or filed unless or until the same shall have a stamp impressed thereon or affixed thereto in the manner directed by such order. Also, by the 6th of the orders of the 25th October, 1852, made by the Lord Chancellor for the purpose of carrying out the provisions of the Suitors in Chancery Relief Act, it is ordered that the fees, specified in the second part of the schedule annexed at the foot of the orders, shall be payable, and shall be collected, not in money, but by means of stamps denoting the amount of such fees, stamped or affixed, at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper on which the proceedings in respect whereof such fees are payable are written or printed, or which may be otherwise used in reference to such proceedings. Finally, among the fees in the record and writ clerks' office, specified in the second part of the schedule at the foot of the above-mentioned orders, is the following—"Filing every bill or information, 1*l*." The bill being for an injunction, the solicitor of the plaintiff filed, in the first instance, a written copy thereof, having a stamp for 1*l*. stamped on the copy. He at the same time gave the undertaking to file a printed copy of the bill within fourteen days, and afterwards, within that period, took a printed copy accordingly to the office of records and writs for the purpose of having it filed. The clerk of records and writs, however, refused to receive or file the copy unless another 1*l*. stamp were affixed, alleging that this was a document requiring such stamp within the meaning of stat. 15 & 16 Vict. c. 87, s. 12. An application was then made to Sir G. Turner, V. C., for an order directing the clerk of records and writs to receive and file the printed copy without the additional stamp; but his honor, although he had made an order to that effect on a former occasion, (see *Lambert v. Lomas*, 16 Jur., 1009; s. c. *post*.) objected that the judges differed in opinion as to the necessity of such a

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*Ex parte Whitaker; In re Whitaker.*

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stamp, and without making any order, requested that the application should at once be submitted to this court. In obedience to this request, he would now ask for an order from their lordships, submitting that the printed copy was merely a substitution for the written copy, and that it did not require to be stamped before it could be filed.

[Sir J. L. KNIGHT BRUCE, L. J. If two stamps are required, there must be two bills. Here there are not two bills, but one bill. Why, therefore, should there be more than one stamp? As at present advised, it seems to me that the preliminary written bill with the printed copy, form together but one bill.]

That is what we submit, the printed copy being filed merely by way of substitution for the other.

[LORD CRANWORTH, L. J. I presume the written copy remains at the office as well as the printed copy?]

It is taken off the file only in case the plaintiff makes default in filing a printed copy in due time, but not otherwise.

[Sir J. L. KNIGHT BRUCE, L. J. But if the printed copy is filed in proper time, then both remain in the office. It is upon that understanding that my observations have been made; but if a general rule is to be laid down, it will be more satisfactory to consult Mr. Berry.]

Mr. Berry, on being consulted, said that it had hitherto been the practice to retain both copies in the office, and that he would take care that such practice should be continued if their lordships thought it essential.

Sir J. L. KNIGHT BRUCE, L. J. Where, as in the present case, the printed copy comes to the office in proper time, and understanding that the written copy remains, as we think it ought to do, on the file, we think that the stamp affixed to the written copy suffices for the two.

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*Ex parte WHITAKER; In re WHITAKER & another.*<sup>1</sup>

March 2, 1852.

*Bankrupt Law Consolidation Act, 1849—Refusal of Certificate—Reference back to the Commissioner.*

Whether the court of appeal has jurisdiction to refer back the question of certificate after the commissioner has refused it, *quære*.

Whether the grant of the certificate by the commissioner after he has once refused it would be valid, *quære*.

JAMES WHITAKER and Joseph Crowther were adjudicated bankrupts. The certificate of Crowther was suspended for three years;

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 25; 1 De Gen. M. & G. 459; 10 Jur. 721.

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*Ex parte Bean; In re Wilkinson.*

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that of Whitaker was refused. Both had protection after three months' imprisonment. The bankrupt Whitaker appealed.

*Bacon and Steere.* Since the hearing before the commissioner, facts have been discovered which lead to a supposition that the commissioner would not have refused the certificate had the case been so presented to his attention. Instead, therefore, of pressing the appeal, the court is now asked to refer the matter back to the commissioner to review his decision.

**KNIGHT BRUCE, L. J.** I doubt whether the 207th section of the act gives the court jurisdiction to refer back the certificate to the commissioner to review his decision.

**LORD CRANWORTH, L. J.** Even if the court did so, and the commissioner re-heard the case, and then granted the certificate, the grant would probably be invalid.

The court then heard the case upon the additional evidence and examined the bankrupt, the appellant, and ultimately varied the order by giving him his certificate after a suspension of three years.

**KNIGHT BRUCE, L. J.** It must be distinctly understood that in varying this decision we do so only on the additional evidence before us, and not as in the slightest degree intimating that, upon the materials which were before the learned commissioner, we should not have come to the same conclusion as he did.

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*Ex parte BEAN; In re WILKINSON.*<sup>1</sup>

March 11, 1852.

*Bankrupt Law Consolidation Act, 1849 — Annulling Adjudication —  
Time for Appeal.*

Where a creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the commissioner's decision on his petition, his appeal is in time under the 12th section of the statute.

A petition to the commissioner to annul the adjudication is not an appeal within the meaning of that section.

**JOHN WILKINSON** was adjudicated bankrupt on the 12th of May, 1851. Mr. Samuel Bean, a creditor, presented a petition on the 30th of June, to annul, on the ground of there being no act of bankruptcy, and there being no sufficient petitioning creditor's debt. The 11th

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 26; 1 De Gex, M. & G. 486.



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*Ex parte Bean; In re Wilkinson.*

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of July was appointed for the hearing, when Mr. Bean attended the District Court; and, after the petitioning creditor's debt had been admitted to proof, the commissioner ordered Mr. Bean's petition to stand over until the 15th of August. Before that day the assignees petitioned against the admission of proof of the petitioning creditor's debt, and on the 18th of August Mr. Bean's petition was again adjourned till after the hearing of the last-mentioned petition. On the 11th of December, 1851, the proof was expunged by the lords justices, and Mr. Bean's petition to annul was heard by the commissioner on the 20th of February, 1852, when it was dismissed, with costs, and from that decision Mr. Bean appealed.

*Swanston and Daniel*, for the appeal.

*Glasse and Hardy*, for the petitioning creditor. As this is an appeal from an adjudication, it should have been presented within twenty-one days from the date of the adjudication — *Ex parte Carter*, 20 Law. J. Rep. (N. S.) Bankr. 19; s. c. 7 Eng. Rep. 312.

*Bacon and Terrell* appeared for the assignees.

KNIGHT BRUCE, L. J. This petition from adjudication appears, so far as the evidence before us goes, to be unsupported by the legal requisites. The case, therefore, fails at law. That, however, is not decisive; but still, when a bankruptcy is insufficient at law, it lies upon those who attempt to support it to show equitable grounds for sustaining it. There appear in this case to be no such grounds shown. With respect to the time of the application, it was made to the commissioner at the end of seventeen days; and if there was any delay, it arose by reason of the pendency of an application by the bankrupt for the same purpose. It is said that the commissioner had no jurisdiction to annul the adjudication upon the application of Mr. Bean, because the adjudication took place on the 12th of May, and his petition of appeal to this court was not presented until the 20th of June, that is, after an interval beyond twenty-one days. We are of opinion that it is not a case of appeal, within the 12th section of the act, from the order of adjudication, but that the appellant's original application to have the adjudication annulled was properly made to the commissioner under the general jurisdiction conferred on him by the act of parliament, and that it was not until he had adjudicated upon that application of Mr. Bean that a case for appeal arose. So far as Mr. Bean is concerned, from the moment when his application to the commissioner was rejected, and not before, it became a case for an appeal as regarded him. He has appealed within twenty-one days after the decision; that is the way in which we view the case.

LORD CRANWORTH, L. J., was of the same opinion.

The case was gone into on the other points, and ultimately the adjudication was annulled.

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 Chadwick v. Chadwick.
 

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CHADWICK v. CHADWICK.<sup>1</sup>

November 6, 1852.

*Discovery—Materiality—Documents relating to a disputed Title—Documents exposing the Defendant to Prosecution for criminal Offence.*

The bill alleged that the defendant had procured an order vesting the legal estate of certain lands in himself, by false statements, and that the Master's report in his favor had been obtained on evidence untrue and fraudulently concocted. The bill interrogated the defendant as to the tenancies of the lands in question, requiring him to set forth the names, terms, rents, &c.; and it also prayed a discovery of the alleged fraudulent documents. The defendant refused to discover the precise terms of the tenancies, or to state what documents he had employed; he admitted that he had let the premises, and that an order of the court of chancery had been made vesting the legal estate in him; he denied all fraud; denied the plaintiff's beneficial title, and affirmed his own; and declared that the documents which he had made use of had been prepared with a view to litigation, but not to this litigation, and after litigation had commenced; and that they did not support, or tend to support, the plaintiff's title, but that, on the contrary, they supported his, the defendant's, title. The defendant also, at the bar, insisted that the effect of the discovery of documents would be, on the plaintiff's own showing, to expose the defendant to a prosecution for perjury:—

*Held*, that the answer was insufficient on both points.

IN 1714 a reversionary lease of certain property in Golden square had been granted by the owner of the fee for forty-nine years, from Christmas, 1798, to Allington and Madox. The representative of the survivor, in 1791 demised the land in question to Sir Andrew Chadwick for forty-nine years, less ten days, from Christmas, 1798. At the same time the reversion in fee, subject to the forty-nine years term, was conveyed to Horsey, in trust for Sir Andrew Chadwick. Sir Andrew died intestate as to his real estate, and without ever having had either brother, sister, or issue. He had, however, four paternal uncles, the eldest of whom was James, and the second Robert. The lease of forty-nine years having expired at Christmas, 1847, the contention arose as to the title to the beneficial interest in the reversion in fee outstanding in Horsey. The previous facts were admitted by all parties. The case set up by the plaintiff, claiming as heir at law of Robert, was, that James, Robert's elder brother, was imbecile, and died *sine prole*; that in 1847 the defendant presented a petition, under Sir Edward Sugden's Acts, claiming the beneficial fee as the heir at law of James, stating that it was not known who was Horsey's heir at law, and praying that a conveyance to him might be ordered from Horsey or his heir at law. On a reference the Master reported in favor of the petition, on the evidence produced before him; and the petitioner obtained a conveyance of the legal estate accordingly. The present suit was instituted to have these proceedings set aside. The plaintiff, claiming as heir at law, alleged that the defendant obtained the report and order by misrepresentations, and prayed that the defendant might be declared a trustee of

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<sup>1</sup> 16 Jur. 1060.

*Chadwick v. Chadwick.*

the premises for him, the plaintiff, and might be decreed to account for the profits, and to convey to him the legal fee. The particular charges in the bill were, that the defendant knew that the statements in the petition of 1847 were false; that the whole of the evidence adduced before the Master on behalf of the defendant, in support of his alleged pedigree, was untrue and fraudulently concocted, and not strictly and legally admissible; that the evidence adduced by the defendant (then the petitioner) of the death and marriage of James Chadwick related, as the defendant well knew, to some other person of the same name; and that so it would appear if the defendant would set forth the evidence adduced by him on these points before the Master. The bill contained the usual charges as to documents. The case now came on upon exceptions for insufficiency. The first exception was to the answer to part of the fourth interrogatory in the bill — "Whether the said six messuages are not now in the occupation of various persons, and whom by name, and whether or not as tenants to the said defendant, John Chadwick, and at what rents and under what tenances, and by what leases or agreements in writing or by parol, and made between what parties?" The defendant, by his answer, submitted that he was not bound to set forth, and refused to set forth, these particulars, but admitted that the same messuages were in the occupation of various persons as tenants to himself. The second exception was as to the answer to the sixteenth and seventeenth interrogatories, inquiring minutely as to whether the defendant had not presented a petition and evidence, as charged in the bill. The defendant refused to answer, and submitted that he was not bound to answer, save that he admitted that under an order of this court the outstanding fee in Horsey had been conveyed to him; and he sought to protect himself by the statements in his answer, "that he claims to be, and is, heir at law of Sir Andrew Chadwick; that all the documents and evidence inquired about were prepared with a view to litigation, and after adverse claims had been put forward," (but he did not say that the plaintiff had then put forward any claim); "that the documents, &c. did not support, or tend to support, the plaintiff's pedigree or title, but that they did support the defendant's title." The defendant, by his answer, traversed the allegations of fraud.

*Batten*, for the first exception.

*Elmsley*, for the defendant, contended, on the authority of the case of *Stainton v. Chadwick*, 3 Mac. & G. 582; s. c., 7 Eng. Rep. 13, that as the interrogatory pointed to relief to which the plaintiff would only be entitled after he had made out his title, and consequential thereon, the defendant was not bound to answer.

[Sir G. TURNER, V. C. It is not merely consequential relief; here you are receiving the rents. Supposing you die, how is the plaintiff to know to whom you have let the land, or for what rents, or whether they have been paid or not? There would, in case of your death, be no one who could give the information. Take the case of a suit

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Chadwick v. Chadwick.

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against an administrator by one of the next of kin for an account. If the administrator denies the title of the next of kin, can he thereby excuse himself from giving an account?]

*Bird*, (with *Elmsley*). First, the discovery is immaterial. *The Marquis of Donegal v. Stewart*, 3 Ves. 446; *Phelips v. Caney*, 4 Ves. 107; *Jacobs v. Goodman*, 2 Cox, 272. The facts inquired about relate solely to our own title. *Bolton v. The Corporation of Liverpool*, 1 My. & K. 88, will not support the plaintiff; on the contrary, it protects us. We obtained possession lawfully; it was, in fact, obtained under the other lease.

Sir G. TURNER, V. C. There is no doubt that the earlier cases, such as those which Mr. Bird has quoted, may be quoted in favor of your view; but a vast number of decisions since have fully established this—that if the defendant answers at all, he must answer fully, or avail himself of his being protected from answering, (if he have a protection), in whole or in part, by plea. As to the case of *Stainton v. Chadwick*, I do not think it applies to the present case. The effect of the doctrine contended for by the defendant, if allowed, would be, that in many instances the plaintiff, though he succeeded in establishing his right, might find himself without a remedy. As in the case which I put before, of a bill against an administrator by one of the next of kin for an account and discovery and administration, the administrator puts in an answer denying the title, and declining to give an account. If that is to be sufficient, in the event of the administrator dying, though the next of kin ultimately makes out his pedigree, he is forever unable to find out what the estate consists of to which he has established his claim. I do not think that Lord Truro intended some of the expressions in the report to be taken at their fullest extent, because he modifies them by the passages which he quotes from Lord Redesdale's Treatise. The exception must be allowed.

The second objection was then opened by

*Batten*, for the plaintiff. Our bill is to have the fraud shown, and we have a right to a discovery of all the documents showing fraud. This brings us within the case of *Smith v. The Duke of Beaufort*, 1 Ph. 209; s. c. 7 Jur. 1095. That case was for the production of documents; but it is the same thing to seek the contents of them. *The Attorney-General v. Thompson*, 8 Hare, 110.

*Elmsley* and *Bird*, for the defendant. All this discovery is quite immaterial, and the end of the discovery, assuming the statements in the bill to be true, would be to expose the defendant to a prosecution for perjury, or subornation of perjury.

[Sir G. TURNER, V. C. If the answer were in the affirmative, would it be immaterial to the plaintiff? His case is, that you presented a petition in 1847, which was fraudulent, and then he asks you the question, did you not present a petition? Suppose you

answer in the affirmative, is not this one step towards establishing a fraud ?]

The only equitable relief suitors can obtain here, in contentions concerning land, is, to put aside all legal estates, which would prevent the real merits from being tried. As to the exemption on the score of exposing the defendant to criminal prosecution, he is entitled to resist every discovery which can furnish a link in a chain leading to that point. A prominent part of the case made by the bill is, that the defendant knew that the state of facts then before the Master was false. The plaintiff charges that the whole of the evidence, the certificates of burial, &c., was untrue, and fraudulently concocted. We are exempted from answering these interrogatories. *Paxton v. Douglas*, 19 Ves. 225; *Thorpe v. Macaulay*, 5 Mad. 223.

[Sir G. TURNER, V. C. Sir Anthony Hart explains, in *Green v. Weaver*, 1 Sim. 404, what was said in *Paxton v. Douglas*. At p. 430, he says, "Some of the *dicta* in that case, namely, in *Paxton v. Douglas*, perplexed me extremely, for Lord Eldon goes the length of saying, not only that a man should not make a discovery that would subject himself directly to a penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be equally objectionable; that every statement in the bill ought to be incidentally leading to the same conclusion ultimately as the prayer of the bill; it is either conclusive to the general result, or unimportant and irrelevant. But I take Lord Eldon to have meant, not that every fact which may lead to the effect of subjecting a defendant to a penalty is objectionable, but that where the sole gist and object of a suit is to convict a man in a penalty, where there could be no other purpose than to have relief in a court of equity on the footing of a penalty, that as a court of equity does not relieve on a penalty, it will not give any such incidental discovery."]

Sir G. TURNER, V. C. (without hearing a reply). I must allow this exception. [His honor read the charges and the interrogatory in the bill, and the denial and partial statement in the answer.] It is argued for the defendant that a full answer to the interrogatory would be immaterial to the plaintiff's case. The test as to immateriality is this: suppose the answer to be in the dry affirmative, would that answer be of no service to the plaintiff? The first step of the plaintiff in support of the allegations in his bill is to prove that these proceedings took place; he cannot move a step without that. An admission that they did take place would be material, and save him expense and trouble. Then it is said that, if the facts were proved, all the court would do would be to remove the legal estate out of the way of a fair trial of the real right. But I do not agree that this is the only decree which the court will make. He rests his argument on this, that he is charged with fraud. I am by no means sure that, if the case were made clear, the court would think it necessary to send an issue to be tried by a jury, and that all the court would think it necessary to do would be to restrain the defendant from availing himself of his legal estate in a trial at law. But if this were so, if

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 Groves v. Lane.
 

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the parties were sent to law, after having established their rights one way or the other, they would come back here for further relief; and then would it not be a material circumstance, in dealing with the costs of all the proceedings, to consider how the parties had conducted themselves with regard to the production of evidence, &c.? But then it is said the bill charges acts and dealings which amount to perjury, or subornation of perjury, on the part of the defendant, and the plaintiff is entitled to no discovery which will form a link in the chain attaching to the defendant the weight of a criminal prosecution. But, on looking at the allegations of the bill, I see nothing in them entitling the defendant to claim exemption from the discovery now sought which would not equally entitle every defendant charged with fraud to say, "I am charged with fraud, and the discovery now asked would expose me to be indicted for fraud." I must therefore make the usual order, allowing the exception, with costs.

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 GROVES v. LANE.<sup>1</sup>

November 13, 1852.

*Administrator ad Litem—New Practice.*

In a creditor's suit,<sup>4</sup> an administrator *ad litem* of the intestate creditor does not sufficiently represent him.

The act empowering the court to proceed in the absence of a personal representative does not apply to such a case.

THIS case had stood over, 16 Jur. 854, s. c. *ante*, p. 376, with leave to amend the claim by making a proper administrator a party, and introducing allegations of the existence of the debt. Amendments had been made alleging the debt, and also that there was no other estate of the intestate, except that which was in the possession of some of the defendants, who had made themselves executors *de son tort*. It now came on again for hearing.

*J. Russell* and *F. T. White*, appeared for the plaintiffs, and contended, in the first place, that under sect. 44 of the 15 & 16 Vict. c. 86, the court could proceed in the absence of the legal personal representative.

Sir R. T. KINDERSLEY, V. C., however, decided, that where the estate of the deceased person formed the subject of the suit, the deceased person could not be said to be interested in the matters in question within the meaning of that section, and held that it did not apply to such a case.

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<sup>1</sup> 16 Jur. 1061.

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Groves v. Lane.

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*J. Russell* and *F. T. White* then contended that they now had an administrator properly constituted. The defendants are the persons who can, by the rules of the Ecclesiastical Courts, take out general administration; and if they decline to do so, we are left in a difficulty, and under such circumstances it is the practice of this court to avoid the difficulty. *Davis v. Chanter*, 2 Ph. 544. If it should turn out that any difficulty arises, a limited administration can be taken out.

*E. Webster*, for defendants in the same interest. There is an allegation that this intestate has no other personal estate, therefore there is none outstanding; therefore, as far as regards the personal estate, all proper parties are before the court. The parties who raise this objection are those who alone have possessed themselves of the estate, and refuse to take out administration.

*Cole*, *Prior*, and *Bowring* appeared for different defendants, but were not heard.

Sir R. T. KINDERSLEY, V. C. The thing appears to me as clear as possible. The suit was instituted by one creditor, on behalf of himself and all the other creditors, to administer the estate of the intestate debtor, that estate consisting of realty and personalty, except that it is said that there is an allegation in the claim that there is no outstanding personalty. It is said that the defendants are the parties interested in the real estate, and not the general administrator; but an administrator *ad litem* is before the court. It is said that for 200 years the Ecclesiastical Court has been in the habit of granting these limited letters of administration — that is to say, letters limited to the purposes of the suit; that that has been the practice of the Ecclesiastical court for 200 years. In all these 200 years can there be produced a case in which this court has made a decree for administering an estate in the absence of a general administrator, and with only an administrator *ad litem*? No such case has been produced, and for the best of reasons, because no such case can be produced. It would be quite sufficient that I am now, for the first time during the whole 200 years, asked to do that which has never yet been done. But it is said that an administrator *ad litem* is so constituted that a decree against him is complete as against the estate of the intestate; and the case of *Davis v. Chanter*, 2 Ph. 544, is cited in support of that proposition; and I am told that if I do not admit it, I shall violate the principles of that case. Was that a suit to administer the assets of the individual who was dead, as is the case here? Here the creditors' suit is to administer the estate of this intestate, and the decree sought is not a decree against an administrator, made against and binding the estate of which he is administrator — for binding the estate is quite different from making a decree to administer. I cannot, therefore, think that in refusing this I in any way violate the principles on which *Davis v. Chanter* was decided. The purpose of an administration *ad litem*, as I conceive, is this — where it is necessary that a certain indi-

*In re Horner's Estate.*

vidual, if living, should be a party, and the individual is dead, you have to bind his estate; if it is not to administer, but to bind, an administration *ad litem* is sufficient. But to administer, you must have a full personal representative constituted. I cannot but adhere to the view which I took when this case was before me on a former occasion. There is, however, an allegation that there was no personal estate except what has been received; but that must be established if it is to be relied upon; and I do not admit that it would be sufficient if established. What you want is to pay all the creditors. It is true that this creditor, being a specialty creditor, might, if he had pleased, have filed a claim on behalf of himself and all other creditors of his class; but that would have made no difference. The decree which the court will make will be for a full and general administration of all the estate, real and personal, among all the creditors generally, giving them their respective parts; and that can only be done in the presence of the legal personal representative duly constituted. I must allow the objection for want of parties, giving, however, leave to amend.

A decree was ultimately taken by consent for foreclosure.

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*In re HORNER'S ESTATE.*<sup>1</sup>

April 24, and May 1, 1852.

*Conversion under compulsory Powers of taking Land.*

Money paid into court for land taken under the compulsory powers of an act of parliament, for public purposes, during the life of a tenant for life, who, by the failure of intermediate limitations, became tenant in fee simple, passed as real estate to her heir.

JOHN HORNER, by his will, devised certain real estate to Maria Horner, his daughter, for life, with remainder to other persons, and an ultimate remainder to the right heirs of Maria Horner. The testator died shortly after the date of his will. In 1839, part of the land devised was subsequently taken by the guardians of the West Ham Poor-law Union, under the compulsory powers of the 5 & 6 Will. 4, c. 69, and the purchase-money (800*l.*) was paid into the Court of Exchequer. Afterwards, upon the petition of Maria Horner, the tenant for life, this sum was invested in the purchase of 800*l.*, 3*l.* 5*s.* per cent. reduced annuities, and it was ordered that the dividends thereof should be paid to Maria Horner during her life. In January, 1852, Maria Horner died, having previously made her will, and thereby appointed executors. The limitations in remainder having failed, the present petition was presented by the heir at law of Maria Horner,



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*In re Levett's Trusts; in re The Trustee Relief Act.*

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and one of the questions raised was, whether the 800*l.* stock was to be considered as real or personal estate.

*Bristowe*, for the petition, contended that the stock was to be treated as real estate. He referred to the 1st and 2d sections of stat. 5 & 6 Will. 4, c. 69, and asked, upon the authority of the latter section, that the guardians of the union should pay the costs of the present petition.

*Prendergast*, for the executors of Maria Horner's will, contended that the stock was personal estate, on the authority of *Ex parte Flammank*, 1 Sim. (N. S.) 260, s. c. 3 Eng. Rep. 243.

Sir J. PARKER, V. C., considered that the stock was money subject to be invested in the purchase of lands, and must be treated as real and not as personal estate. Costs according to the act.

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*In re LEVETT'S TRUSTS; and in re THE TRUSTEE RELIEF ACT.*<sup>1</sup>

June 26, 1852.

*Petition — Affidavit.*

Petitions under the above act should state the affidavit on which the trustees paid the fund into court.

THIS was a petition under the act for the relief of trustees, praying for the payment to the tenant for life of the income of a fund paid into court by trustees under the act. The petition did not set out the affidavit made by the trustees on paying in the fund.

*Renshaw* appeared for the petitioner; and

*Dauney* for the trustees.

Sir J. PARKER, V. C., said that petitions under the Trustee Relief Act ought to state the affidavit made by the trustees on paying in the fund, as the affidavit was the declaration of trust on which the court acted. His honor added that it was very inconvenient when this was not done.

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<sup>1</sup> 16 Jur. 1063.

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*In re Stewart's Estate.*

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*In re STEWART'S ESTATE.*<sup>1</sup>

November 5, 8, and 9, 1852.

*Conversion—Election—Land taken under compulsory Powers conferred by Statute for Public purposes.*

Where the purchase-money of land taken under the compulsory powers of an act of parliament, for public purposes, is paid into court, subject to be reinvested in the purchase of land, free of expense to the parties beneficially interested, on their petition, it is impressed with real uses, and is *prima facie* to be treated as real estate.

If the person absolutely entitled to the money-land have a right to elect to take it as personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeathes personal estate only, and does not devise realty, are not such proof of election as to prevent the fund descending on his death to his heir.

JOHN STEWART, by his will, dated the 19th March, 1823, devised ten dwelling-houses, situated in and near the London-road, in Manchester, with their appurtenances, to trustees, upon trust to receive the rents, issues, and profits thereof, and, after causing the same premises to be kept in substantial repair throughout, to pay the remainder of the whole of such rents, issues, and profits of the same premises for the maintenance, support, education, and advancement of Eliza, Henry, and Frederick, the children of Mary Cramer, until the youngest of them should attain the age of twenty-one years; and from and immediately after the attainment of the youngest of them to the age of twenty-one years, upon further trust to pay the rents, issues, and profits of the said hereditaments, or so much thereof, as should remain undisposed of for the purposes aforesaid, into the proper hands of his grand-niece, the said Eliza Cramer, for her sole and separate use and benefit; and from and immediately after the decease of the said Eliza Cramer, to stand seised of such hereditaments to the use of all the child or children of the said Eliza Cramer, equally, if more than one, as tenants in common, his, her, and their heirs and assigns; and if but one child, then to such one, his or her heirs and assigns forever; and in case of default of such children of the said Eliza Cramer, or such children living to be entitled, or issue of such children living to be entitled, then to the use of Henry Cramer and Frederick Cramer, the brothers of Eliza Cramer, their heirs and assigns forever, as tenants in common. The testator died in May, 1833, leaving the said Eliza Sarah Cramer, Henry John Cramer, (in the will called Henry Cramer), and Frederick Augustus Cramer surviving. By an act of the 2 Will. 4, intituled "An Act for widening and improving a part of London-road, in the parish of Manchester and county of Lancaster, and also for effecting improvements in the streets and other places within the town of Manchester," the commissioners for cleansing, lighting, watching, and regulating the town of Manchester, were empowered to purchase, and take by

<sup>1</sup> 16 Jur. 1063.

*In re Stewart's Estate.*

compulsory process, certain lands, houses, buildings, and premises, which were mentioned and set forth in the schedule to the said act, for the purposes of the said act; and by the said recited act, and by the acts of parliament therein recited, it was enacted that the purchase-money to be paid for any such lands, houses, buildings, and premises, as were the property of *femes covert*, infants, and so forth, should be paid into the Bank of England into the name of the Accountant-General of the Court of Exchequer, subject to the orders of the said court, in the usual manner. The houses and premises comprised in the above recited devise contained in the will of the said John Stewart were part of the hereditaments which the said commissioners were so authorized to take and purchase. By an agreement in writing, dated the 12th February, 1836, and made between the trustees of the will of the one part, and the improvement committee appointed by the said commissioners of the other part, the said trustees, so far as under and by virtue of the powers of the said act they lawfully could, agreed to sell, and the said committee agreed to purchase, the houses and premises comprised in the said devise, and the inheritance thereof in fee simple, free from incumbrances, at the price or sum of 2,000*l.* Thereupon, or shortly after the execution of the said agreement, the said improvement committee were let into possession of the houses and premises comprised in the said agreement, and used the same in the purposes of the said act, and they paid the said sum of 2,000*l.* into the Bank of England in the name of the Accountant-General of the Court of Exchequer, to an account entitled "*Ex parte* The Commissioners for executing an Act to amend several Acts for supplying the town of Manchester with gas, and for regulating and improving the said town." By an order of the late Lord Abinger, (then Lord Chief Baron of the Court of Exchequer), dated the 14th February, 1838, and made upon the petition of the said trustees and the tenant for life under the said will, it was ordered that the said Accountant-General of the said Court of Exchequer should lay out and invest the said sum of 2,000*l.*, then standing in his name as aforesaid, in the purchase of 3*l.* per cent. bank annuities, and should carry over such bank annuities to an account to be entitled "*Ex parte* the Commissioners of the Manchester Gas and Improvement Acts, the Account of the Trustees of John Stewart, deceased;" and it was ordered that the said Accountant-General should pay the dividends to accrue due on the said bank annuities to the said Eliza Sarah Ravenscroft during her life, on her sole receipt, for her separate use, until the further order of the court; and it was ordered that the said improvement committee should pay the costs of the petitioners of the said petition, as therein mentioned. In pursuance of the said order, the Accountant-General of the said Court of Exchequer laid out the said sum of 2,000*l.* in the purchase of the sum of 2,139*l.* 0*s.* 9*d.*, 3*l.* per cent. reduced bank annuities, and carried the same over to the said account, entitled "*Ex parte* the Commissioners of the Manchester Gas and Improvement Acts, the Account of the Trustees of John Stewart, deceased;" and upon the abolition of the equitable jurisdiction of the said Court of Exchequer, the said sum of 2,139*l.*

*In re Stewart's Estate.*

0s. 9d., 3l. per cent. reduced bank annuities, was transferred from the name of the Accountant-General of the said Court of Exchequer into the name of the Accountant-General of the Court of Chancery, to the same account, and subject to the orders of this court. The tenant for life, Eliza Sarah Ravenscroft, continued to receive the dividends which accrued on the said trust funds down to the 10th October, 1849, before her decease, and she died on the 23d December, 1849, without having had any children, and leaving the said William Richard Ravenscroft, her late husband, her surviving. The said Henry John Cramer, who was entitled in fee simple to one moiety of the said real estate, subject to the life-estate of the said Eliza Sarah Ravenscroft, and the failure of her children as aforesaid, departed this life in the lifetime of the said Eliza Sarah Ravenscroft, and on or about the 28th June, 1844, intestate as to real estate, having made a will, of which the following is a copy — that is to say, "This is the last will and testament of me, Henry John Cramer, of Trinity Hall, in the University of Cambridge, gentleman. First, I give and bequeathe unto my friend, Robert Curtees Hubbersty, of St. Peter's College, in the University of Cambridge, my small library of books; and as to all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, I give and bequeathe the same unto my executors hereinafter named, their executors, administrators, and assigns, (who I request will deliver my wearing apparel to my brother Frederick); and I hereby nominate, constitute, and appoint my friends, Horatio Crisp, of the town of Cambridge, and the said Robert Curtees Hubbersty, joint executors of this my will, (confidently relying, that in the performance of their duty they will carefully protect the interests of my mother); and hereby revoking all former wills by me at any time heretofore made, I do declare this only to be my last will and testament." His heir now petitioned for payment of one moiety of the fund to him.

*Smythe*, for the petition.

[STUART, V. C., asked whether a tenant in fee simple of the land could petition for the reinvestment of the money in land.]

Yes; because he has a right to be restored to his former position, without the expense of effecting a reinvestment himself. *Ex parte Flamank, re Cross's Estate*, 1 Sim. (N. S.) 260, s. c. 3 Eng. Rep. 243, was a different case to this, because there the person from whom the land was taken was tenant in fee in possession, but, being lunatic, the land was taken from him under the compulsory powers of the Lands Clauses Consolidation Act, 1845, and that was equivalent to an agreement for the sale by himself, which, of course, would have been a conversion. It cannot be so when land is taken during the life of a tenant for life, who has no power himself to convert it. But that decision differed from *The Midland Counties Railway Company v. Oswin*, 1 Coll. 80.

*W. D. Lewis, amicus curiæ*, referred to the case of *Re Taylor's Settlement*, 9 Hare, 596, a case under the London Bridge Acts.

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*In re Stewart's Estate.*

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STUART, V. C., carefully compared sect. 35 of the act in that case, 4 Geo. 3, c. 50, with the corresponding section relied on in the present case, and expressed his opinion that upon all the material words the sections were identical, and that the land for the purposes of the present question, was not converted by what had been done under the act; but his honor called the attention of counsel to the question whether the acts of Henry John Cramer did not amount to an election to take the land as personalty.

*Greene*, contra, relied upon the long acquiescence of Henry John Cramer in the investment of the money in stock, on the fact that he never applied to have it reinvested in the purchase of land, on the bequest of all his personal estate — which he had no other personal estate except this to satisfy — and on the absence of any devise of real estate, as showing that he intended to treat this money as personal estate, and therefore that it must have passed as such by his will.

[STUART, V. C. To establish a constructive election depending upon circumstances somewhat short of an actual declaration, the circumstances must be such as unequivocally show a manifest intention to elect.]

He referred to *Cookson v. Cookson*, 12 Cl. & Fin. 121.

[STUART, V. C. You must show acts — unequivocal acts — of the party electing.]

*Smythe*, in reply, cited *Re Horner's Estate*, 16 Jur. 1063, s. c. *ante*, p. 531.

STUART, V. C. In this case Henry John Cramer was entitled to an interest in fee simple in remainder in certain real property in Manchester. That property had been devised to a lady for life, and the interest devised in remainder to Henry John Cramer was defeasible in the event of children being born of the tenant for life. This real estate was taken by the commissioners of the Manchester Improvement Act, for the purposes of that act. The land was taken under the compulsory powers of the act, and the money which represented the value of this real estate was paid into court under the provisions of the act, and invested in consols, and the dividends of those consols were ordered to be paid to the tenant for life. No application was ever made to the court for the reinvestment of the consols in real estate, but the money was in court as representing real estate, and the parties entitled to the money were those who were entitled to the real estate; and but for the operation of the act, in the events which have happened, and at the present time, the heir or devisee of Henry John Cramer would be entitled to one moiety of this real estate, and the possession and enjoyment of it. It is contended, however, on the part of the personal representatives of Henry John Cramer, and of those interested in his personal estate, that the effect of the transactions under the act was to convert the quality of the estate of Henry John Cramer in this property into personal estate, or,

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*In re Stewart's Estate.*

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if not so converted, that at least, from the nature of the interest which he had in the property, he had a right to elect that the property should be his property as his personal estate, and not as real estate. The questions which I have to consider are, first, whether, by the operation of the act, this real estate has been converted absolutely into personal estate, and is to pass to the representatives of Cramer as personal estate, and, secondly, if not, whether it is so converted by reason that, Cramer having a right to elect to enjoy it as personal estate, some act was done by him in his life to testify such election. In support of the argument that the property has been converted into personalty, the authority of a case decided by Lord Cranworth has been cited; and I must say that that case does countenance the argument that the property, having been converted under the compulsory powers of the act, is to be treated as personal estate. It would not go the whole extent contended for in this case, but it countenances the principle. Against that authority there have been cited decisions of Sir J. L. Knight Bruce, V. C., Sir G. Turner, V. C., and the late Sir J. Parker, V. C. I accede entirely to the principle upon which these three decisions proceed. I think, that in a case of this kind, where money is paid into court, where real estate is converted, by the compulsory powers of these acts, into personal estate, and remains in court subject to the rights of the parties interested in it to have it reinvested in land, it is to be considered as money or personal estate in the hands of this court impressed with the trusts of real estate. That is a sound principle, and there must be strong words in the act to induce the court to act on the assumption that it is personalty. Therefore it seems to me clear, upon authority and principle, that, independently of any act on the part of Cramer, his interest in the money in court in this case is to be considered, for the purpose of the question who was entitled to it on his death, as real estate. A doubt has been suggested whether he had a right to elect. I am of opinion that if he had, no act of election, such as to have any weight with the court, appears in this case. If so, it is needless to consider whether he had the power in question, and I do not touch that question. It is enough for me to find that there are no facts to show an election with regard to Cramer's interest in this property, which was personal property in this court impressed with the character of real estate. No act of election appears, and therefore I am of opinion that there has been no election on Cramer's part, and that the claim of this petitioner is plain. As this was a fair question, the costs of all parties must be paid out of the fund.

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*Ex parte Hunt; In re Hunt.*

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*Ex parte HUNT; In re HUNT.*<sup>1</sup>

January 21 and 22, 1852.

*Bankrupt Law Consolidation Act, 1849 — Certificate — Fraudulent preference.*

A bankrupt, having had his certificate refused, was taken in execution, and lodged in gaol. The ground of the refusal of the commissioner was a fraudulent preference within the 256th section of the 12 & 13 Vict. c. 106; but the Court of Appeal, being of opinion that such a charge was not sustained, granted a certificate of the third class, and directed the release of the bankrupt from prison on a given day.

THE facts of this appeal from the decision of the commissioner, Mr. Ayrton, refusing the bankrupt any certificate or protection, were as follows:—

Henry Hunt commenced business as a commission agent, at Hull, with a capital of 10*l.* only, in December, 1849. In March following, he married a widow, who carried on business as a Berlin wool dealer, and was the apparent owner of the stock in trade. This stock in trade was bought with moneys belonging to a Mrs. Elizabeth Clark, the mother of the petitioner's wife, who from time to time, advanced her daughter money, amounting to 400*l.*, to enable her to carry on the business; and the daughter executed to her a bill of sale, dated the 1st of November, 1849, of the stock in trade, as a security for 350*l.*, part of such amount. In January, 1851, Mrs. Clark demanded payment of 140*l.*, part of the debt, and the petitioner not being able to pay the amount, a bailiff was put into possession, whereupon Mrs. Hunt, by direction of the bankrupt, addressed a letter to Mrs. Clark, requesting that she would consent to become a guarantee for the payment of a composition of 5*s.* in the pound to the creditors. She refused to become so, unless she were paid 140*l.*, part of the debt, and said, that unless it were paid, she would proceed to a sale under the bill of sale. To this the bankrupt agreed, and, on the 25th of January, remitted to Mrs. Clark 140*l.*, and she thereupon consented to become such guarantee, and to withdraw the bill of sale, provided the creditors would accept the composition. In order to pay this 140*l.*, he borrowed of Messrs. I. & J. Martin, of Liverpool, 220*l.*, on the security of the bill of lading of a cargo of clover-seed, and out of it he paid Mr. Oakes 30*l.*, which had been advanced on the security of goods belonging to the petitioner's brother, and to his solicitor, 25*l.* The petitioner subsequently addressed a circular letter to his creditors, offering them the guaranteed composition; but in the month of January, 1851, before such proposed arrangement could be effected, Messrs. Thomas & Robert Raikes filed a petition for adjudication of bankruptcy against him, under which he was declared a bankrupt, owing 1,600*l.*, and not having sufficient assets to pay the expenses

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 29.

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*Ex parte Hunt; In re Hunt.*

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of the bankruptcy. From this he appealed to the Vice-Chancellor sitting in bankruptcy, on the ground that the alleged act of bankruptcy was not sufficient to support the adjudication; but further evidence having been adduced, sustaining other acts of bankruptcy, the Vice-Chancellor, although doubting whether the act of bankruptcy relied on by the commissioner was sufficient, thought that the new affidavits furnished evidence of an act of bankruptcy sufficient to support the adjudication, and therefore dismissed the petition, but without costs. Upon an application for a certificate, Mr. Commissioner Ayrton, on the ground that the petitioner had been guilty of a fraudulent preference, under the 256th section, by the payment made to Mrs. Clark and Mr. Oakes, and that his conduct as a trader had been reckless, refused to grant any certificate, and the bankrupt, being taken in execution, was conveyed to Lincoln Castle, where he remained at the date of the hearing of the appeal.

*Bethell and Kinglake*, for the petition.

*Russell and Greene*, on behalf of the assignees, opposed.

*Kinglake* was heard in reply.

LORD CRANWORTH, L. J. The conduct of the bankrupt in this case is, to say the least of it, most unsatisfactory. It is not strictly correct to say this court administers punishment under the bankrupt laws; so to consider the act would be a misconstruction. The statute declares, that under certain stated circumstances, the bankrupt shall have a certificate of the first, second, or third class. The only discretion left to the court is the granting of the certificate, of what class it shall be, and when it shall be granted. If the granting of the certificate is delayed until a future day, its delay is tantamount to a punishment, because the bankrupt, in the meantime, is open to arrest by the creditor. That being so, the court will direct which certificate shall be granted; or, acting still more severely, can, as the commissioner has here done, refuse any certificate at all. If the conduct of the bankrupt has been more or less culpable, so the court will award a higher or lower class of certificate, or refuse it altogether. Speaking for myself alone, in justice to the bankrupt, I must say that there does not appear to have been any fraudulent preference in the bill of sale which was given to the wife's mother; it was given by the wife before the marriage, and the mother had at one time a bailiff actually in possession of the goods. It was an unfortunate circumstance that the offer of the 5s. in the pound was not accepted; it does not appear, nor has it been asserted, that the offer was not made *bonâ fide*, and for the purpose of relieving the bankrupt from his difficulties. In some respects the conduct of the bankrupt I consider to be very unsatisfactory. The system of commencing on so small a capital as 10*l.*, and entering into engagements of such a character as here appears, is absurd. When the bankrupt set up in business at Hull, he styled himself a merchant, and might, therefore,



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*Ex parte Orford; In re Rufford.*

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have led the public to believe he was a person of substance. The term "merchant" among commercial people would be received in a sense very different from that in which it here ought to be understood. Then, in a little more than a twelvemonth the bankrupt appears, for a person in his circumstances, to have expended in household matters a large sum, even allowing for a little latitude on account of his having married during that time. On the whole, I am of opinion that justice will be done if the bankrupt be allowed a certificate of the third class only; its issue to be suspended until the 31st of the present month.

KNIGHT BRUCE, L. J. Whether the view taken by the learned commissioner can be sustained or not, I give no opinion; neither must I be understood as agreeing with him in the reasons for which he refused the bankrupt his certificate. On the evidence it appears to me, as it does to my learned brother, that this is not a fit case for the entire refusal of a certificate. I consider that the *quantum* of imprisonment suffered by the bankrupt will, by the end of the month, be sufficient to satisfy the justice of the case. Viewing the conduct of the bankrupt, as the court does, it appears to be open to the strongest observation and the gravest censure. Whether there has been a fraudulent preference or not, such conduct as is apparent here ought not to be passed over without censure and punishment. On the 31st of the present month the bankrupt will be set at liberty.

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*Ex parte ORFORD; In re RUFFORD.*<sup>1</sup>

March 3, 1852.

*Bankrupt Law Consolidation Act, 1849 — Friendly Society — Treasurer.*

Money which, by the rules of a friendly society, ought to have been deposited with a treasurer appointed by the society, was paid directly to the bankers of the society. The bankers were adjudicated bankrupts, and the society, under the 167th section of the Bankrupt Act, claimed to be paid in full, and in support of the claim filed an affidavit, swearing that the bankers were "employed in the office of treasurer:"—

*Held*, that the petitioners were not entitled to payment in full.

THIS was the petition of the stewards of a friendly society, duly enrolled, praying the reversal of the decision of the commissioner, who had refused to order the payment in full of the sum of 132*l.* out of the estate of Messrs. Rufford, Rufford, & Wragge, bankrupts. The second rule of the society provided for the keeping of the books "by a clerk, to be appointed by a majority of the members;" and the

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 31; 1 De Gex, M. & G. 483; 16 Jur. 861.

*Ex parte Orford; In re Rufford.*

third rule directed that there should be a treasurer or treasurers appointed in like manner as the clerk, "in whose hands shall be deposited all the cash belonging to this society till the same can be placed out at interest," &c.; and the twenty-first rule provided that "as soon as sufficient money shall be collected, the same shall (after leaving a sufficient sum in the club-box to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of this society, and that the clerk and two stewards shall take the same to the bank," &c. The bankers were not appointed treasurers. The petition, and affidavit in support of it, stated that the bankrupts "were employed in the office of treasurers of and in the said society, and they had in their hands and possession at the time of the said adjudication, by virtue of their office and employment," (the sum in question,) "and the same was in their hands, not as bankers of the society, and in the ordinary way of banking business, but wholly as treasurers of the said society." It was, therefore, prayed that the decision might be reversed, and that payment in full might be ordered out of the estate.

*Bacon and Renshaw* contended, that as the 167th section of the new Bankrupt Act gave friendly and other societies the right to payment in full where bankrupts who have been either appointed "or employed" have money in their hands, the petitioners were entitled to that privilege. Had the words of the new statute been confined, as the old Bankrupt Act was confined, namely, to persons "appointed" to an office being bankrupt, the case would have been different, and would have been governed, adversely to the petitioners, by the case of *Ex parte Harris*, 1 De Gex, 162; they, therefore, submitted that, upon this distinction, and the wider words used in the new statute, the legislature intended persons situated as were the petitioners, to have, and the court would give them, the privilege of full payment.

*Swanston* and *J. V. Prior* appeared for the assignees but were not called on.

Knight Bruce, L. J. We are both very clearly of opinion that the bankrupts were not officers within the words of the 167th section, which says, "if any person appointed or employed in any office in any society" established under the Friendly Societies Acts, "or having in his hands or possession, by virtue of his office or employment, any moneys or effects," and so on, the court may order full payment of such moneys "which the bankrupt received by virtue of his said office or employment;" and we think, therefore, that there is no foundation for the appeal. It must be dismissed, and with costs.

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*Ex parte Rufford. — Ex parte Wragge.*

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*Ex parte RUFFORD, in re RUFFORD. — Ex parte WRAGGE, in re WRAGGE.*<sup>1</sup>

June 4, 5, 7, 8, 9, 10, 1852.

*Bankrupt Law Consolidation Act, 1849 — "Conduct as a Trader" — Banker — Certificate.*

Bankers who, upon the evidence before the court, must be taken to have been, and to have known that they were, deeply insolvent, continued to receive deposits, and to issue notes for a period of eighteen months, during which time their assets would not pay more than 5s. in the pound; on an adjudication of bankruptcy, the commissioner for this, among other reasons, refused them any certificate or protection. On appeal, the court affirmed the refusal of certificate on the above-stated ground, but, upon the consent of the assignees and of the opposing creditors, granted protection to their persons.

The certificate is a benefit to which a bankrupt may entitle himself by good conduct.

Whether, after a refusal of a certificate, the grant of protection is of any avail against the common law right of creditors who do not come in under the bankruptcy, *quære*.

THESE were the petitions of Mr. Francis Rufford and Mr. Charles John Wragge, praying that the decision of Mr. Commissioner Baggay, of the Bristol District Court, dated the 1st of May, 1852, by which he had refused the petitioners their certificates and protection, might be reversed or varied, and that certificates might be granted, or, if the court should refuse, that then they should have protection granted to them. From the documentary and other evidence, and from the examination of the bankrupts before the commissioner, the following appear to be the facts: — Before 1840, Mr. Philip Rufford was engaged in partnership with his son, Mr. Francis Rufford, in the Broomsgrove Bank; and they, together with Mr. Charles John Wragge, carried on, in partnership, the Stourbridge Bank. Mr. Francis Rufford managed the Broomsgrove Bank, Mr. Wragge managed that at Stourbridge; Mr. Philip Rufford was not actively engaged in either, and the adjudication having been extended to him, he had a third class certificate granted to him, but it was suspended for twelve months. The two Ruffords commenced business with a nominal capital of 2,500*l.* each, and Mr. Wragge with that sum in cash. Among many speculations in which the bankrupts were engaged, were the British Alkali Company, which was indebted to the Broomsgrove Bank, in 1844, in 67,000*l.*, in full payment of which the bank accepted from Messrs. Fardon & Gossage their shares in that company, in the White Lead Company, and in the Disc Engine Company; and in 1851, 53,000*l.* more had been spent by the Broomsgrove Bank, in these speculations, besides which, for interest, costs and charges, this bank had a demand, in respect of such property, of 60,000*l.* The shares of the Alkali Company were of no value; and the Disc Engine produced no profits. A colliery proprietorship owed the Stourbridge Bank, in 1841, a large debt, and the colliery called the Churchbridge Colliery was

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 32.

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*Ex parte Rufford. — Ex parte Wragge.*

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conveyed to their bank in payment, but it was worked at a loss. The same bank advanced 10,000*l.* to the Bloxwich Colliery proprietors, and their debts increased in 1846, to 34,000*l.*, and in 1851, to 43,000*l.* The recklessness of these speculations formed a ground for the commissioner's judgment. Down to 1843, the bankrupts banked with Messrs. Spooner & Attwood, when their account was closed, the Broomsgrove Bank account being in debt 40,000*l.*, while the Stourbridge Bank account was in credit 7,000*l.* The accounts were transferred to the house of Glyn, Hallifax, & Mills, who, in 1847, made complaints of overdrawing, and ultimately, in June, 1851, they refused to honor the notes of the banks, and, accordingly, they stopped payment, and the partners were adjudged bankrupts. The books of the banks proved that, in the latter part of 1849, both were very deeply insolvent, and so continued down to June, 1851. Between January and June, 1851, the Broomsgrove Bank received deposits amounting to 7,000*l.* and the Stourbridge Bank to 8,500*l.* The Messrs. Glyn had a claim for 70,000*l.*, but they held property and securities covering the amount; but for the general body of creditors there was nothing but the balances which were due to the two banks. There had been transfers from time to time from one bank to the other of assets, and in June, 1851, the Broomsgrove Bank owed the Stourbridge Bank 120,000*l.*

*Sir W. P. Wood*, *Atherton*, and *Renshaw*, supported the petitions of appeal, and in their argument distinguished the present case from those of *Ex parte Dornford*, 20 Law J. Rep. (N. S.) Bankr. 7; s. c. 5 Eng. Rep. 242; *Ex parte Wakefield*, 17 Law Times, 55; s. c. 7 Eng. Rep. 302; *Ex parte Holthouse*, 21 Law J. Rep. (N. S.) Bank. 3; s. c. 8 Eng. Rep. 277; and *Ex parte Martyn*, (then recently before the court).<sup>1</sup> They also cited and commented on, *Ex parte Jardine*, 1 Fonbl. Bank. Rep. 182, and *The St. Alban's Bank case*, Ibid. 84.

*Swanston* and *Huddleston* opposed the appeal, on behalf of the trade and official assignees.

*Bacon* appeared for opposing creditors.

*Sir W. P. Wood* was heard in reply.

Counsel, in answer to a question from the court, said that the assignees and the opposing creditors had no objection to personal protection being granted.

LORD CRANWORTH, L. J. This is a very distressing case, and if further consideration would have been of any use, we would have taken further time to look at the examinations used in evidence; but the truth is, that the point we have to decide does not depend on a very nice construction of the particular passages to which our attention has been drawn, but depends rather upon those general princi-

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<sup>1</sup> This case will be found in a subsequent page.

• *Ex parte Rufford. — Ex parte Wragge.*

ples which have been discussed in the able arguments which have been addressed to us. The question is, whether these gentlemen, Mr. Francis Rufford and Mr. Wragge, or either of them, are entitled to a certificate under the 198th section of the Bankrupt Act. The learned commissioner, having heard the case, refused the certificates, and Mr. Francis Rufford and Mr. Wragge have appealed to us; and the question is, whether they have made out such a case as to warrant our saying that the commissioner is wrong. It is our duty, and it is a very painful one, to say that they have failed in establishing such a case; and we think, therefore, that the commissioner was right.

It is said that he proceeded on several grounds, one of which was, that the parties had laid out money on improvident investments as bankers; but it is not necessary for us to consider how far the investments were of such a character; for, independently of that, we think that the bankrupts have not so conducted themselves as to warrant the granting of a certificate; that they have misconducted themselves as traders, by going on trading and receiving deposits after they must have known they were utterly and hopelessly insolvent. Sir William Wood said — "This is often the case with men who afterwards retrieve their affairs, and recover themselves;" but I hope this is a somewhat exaggerated representation, caused by the sanguine view which he takes of his clients' case; for I must observe, that although that may be sometimes the case, it would be no justification for such conduct, and least of all in the case of bankers, because every one must know that the misery produced in a neighborhood by the failure of a bank is so great that one almost shrinks from contemplating it, and it appears to have been the case in the present instance. The question is, did the bankrupts continue to carry on their business as bankers when they must have known that they were hopelessly insolvent, and that misery and ruin must be the consequence of their continuing to do so? I think it is impossible to answer that question otherwise than affirmatively. At the time of the bankruptcy there were assets of the Stourbridge Bank to the amount of 4s. in the pound, and of the Broomsgrove Bank to the amount only of 1s. in the pound, not taking into consideration the expenses of the bankruptcy. So that, looking at the facts of the case in the most favorable light, they continued as bankers to receive deposits, knowing that if their whole affairs were wound up, there would not be more than 5s. in the pound, and that, in my opinion, is conduct utterly unjustifiable. That was the state of the assets when the bankruptcy took place in 1851, and there was no great difference from the state of their assets in 1849 and at the time of the bankruptcy. When had the parties a knowledge of this state of affairs? There is abundant evidence to show that the truth of the case was perfectly manifest to their minds. In September, Mr. Wragge came to London, to Messrs. Glyn & Co., and had an interview with Mr. Glyn and his solicitor, and Mr. Glyn consented to make further advances with great reluctance, because on the 19th, Mr. Wragge writes to Mr. Francis Rufford that if Mills — (he was the junior partner in the house of Glyn & Co.) — had been there, they would not have got the money. That was the state of

*Ex parte Rufford. — Ex parte Wragge.*

things in September. On the 7th of October, Mr. Wragge having returned into the country, and, at the instance of the Glyns, investigated the state as well of the Stourbridge as of the other bank, writes a letter to Mr. Francis Rufford, in which he says, "I cannot see my way without something important and immediate from the engine." "Engine" means the patent right in the disc engine, the result of which is always doubtful; and to rely upon that, however useful and ingenious the disc engine might be, in order to make up the deficiency, was absurd. An investigation takes place, various letters pass on the occasion, and the Glyns, requiring further information, write into the country; and I was much struck by the letter of the 12th of October, from Mr. Wragge to Mr. Francis Rufford, saying that the "answer to Glyn must be written with great care." To be sure, all letters on business ought to be written with great care; and I cannot help seeing that he meant, "Answer truly, but let it be such an answer as shall lull suspicion." It was an answer written with great care — the whole truth was not discovered. It was not *suggestio falsi*, but certainly it was *suppressio veri*. The correspondence goes on with Messrs. Glyn, and more assistance is obtained; but if at that time, Mr. Wragge had looked into the affairs of the banks, he would have known, and must on the evidence be taken to have known, that the Stourbridge Bank owed 225,000*l.*, and had no more than 4*s.* in the pound, and the Broomsgrove Bank owed 227,000*l.*, and had less than 1*s.* in the pound of assets. Having ascertained that, they continued to receive deposits from rich and poor, but with a perfect knowledge that if all demands were made on them at once, there was not the remotest hope of paying them in full. This state of things continued for a year and a half before the bankruptcy; and I must say it is conduct in traders such as clearly disentitles them to the benefit of certificates.

It is said that by refusing the certificates we shall be placing them in the same category as the bankrupt in the case of *The St. Alban's Bank*, which was clearly a breach of trust, — a misappropriation of a bill; and confounding them with the bankrupt in *Holthouse's case* who bought goods on credit and immediately sold them at lower prices — conduct something analogous to swindling. In one sense this is all true, so far as the refusal is to be regarded as a punishment; but this is a misfortune incident to all laws that partake of a penal character. It is impossible that persons shall not sustain the same amount of punishment, though they may not be precisely equal in guilt. If this were, not so, no murderer could be hanged, except for the worst kind of murder. If we are to make nice distinctions, and say that if the moral guilt of one bankrupt be somewhat less than the moral guilt of another, we will not visit both alike, we might as well say in cases of murder, that if one murder committed is not of equal aggravation with another, — that one has circumstances of extenuation which another has not, — you cannot possibly execute any murderer of the less atrocious dye. I do not agree to that; and to such an extent the principle must be carried, if the appellants' case is to be decided on the evidence adduced. Human laws cannot make such nice dis-

*Ex parte Rufford.—Ex parte Wragge.*

tinctions, especially laws relating or analogous to criminal justice. But I do not agree that we have to inflict a punishment; the case is, whether the conduct of the parties as traders is such as entitles them to a benefit in the shape of a certificate, giving them protection from their creditors; it is rather withholding a benefit from them which good conduct might have entitled them to, than awarding to them a punishment. I think, however, with regard to this case, the interests of society require that we should not cast any doubt on the judgment of the learned commissioner, and that we ought to refuse a certificate to both these gentlemen; for, though distinctions have been attempted to be made between their cases, and stress laid upon the difference of their temperaments, we cannot go into those niceties. I think it utterly impossible to believe that two persons who day by day, and almost hour by hour, were in communication with each other, by letter and personally, could either of them be ignorant of all that was known to the other; both of them must have known that in truth their affairs were desperate; and if they did not, they must have wilfully closed their eyes to the truth; and I am much struck with Mr. Wragge's answers in his examinations; for when he was asked as to the state of their affairs in 1849, he did not venture to say that he believed that the banks had the means of paying their debts; that they were not, in fact, insolvent. There is no objection raised on the part of the assignees to protection being granted to the bankrupts; and I am of opinion we ought only to grant it by consent as far as it can be made available. It is not necessary to discuss the question how far it is available. It is available against creditors coming in under the statute; but whether it may avail against the common law right of any creditor not coming in under the bankruptcy, it is no part of our duty to speculate. Our judgment must simply be to dismiss the appeal, qualifying the order in regard to protection so far as to show that it is consented to by the assignees and the opposing creditors.

KNIGHT BRUCE, L. J. Acceding, entirely, to what has just been said by my learned brother, I wish to be distinctly understood as not departing from any thing said or done by me in the cases of *Wakefield*, *Dornford*, *Johnson*, and *Martyn*. If I had been persuaded that there had been any error in all, or any, of those cases, on my part, I hope I should have been prompt to have stated it; but having, since the commencement of the argument, considered those four cases, I adhere to them as decided by myself, observing only in passing as to *Dornford's case*, that my only doubt was, whether he had not been too severely dealt with by the commissioner. My opinion, ultimately, was, that he was not. The present case is importantly distinguishable from each and every of those cases. The present case is distinguishable not only by the fact that these gentlemen were bankers in a populous neighborhood, but also on other grounds. The bankruptcy happened in June, 1851, and it is not necessary to go further back with the history of these gentlemen, or the banks, than the autumn of 1849, and I do not think that it would be of any advantage to the

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*Ex parte Rufford. — Ex parte Wragge.*

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bankrupts to go further back. Commencing at that period, I have to ask myself these questions. "Is it, or is it not, clearly proved that, in the autumn of 1849, these parties then were, on a just and reasonable view and estimate of their assets and liabilities, deeply insolvent?" On the evidence, that question can only be answered in the affirmative. Again, "Did they, at that time, know the state of their affairs, and that they were insolvent?" It may be a proper question to consider, what was their own estimate of the state of their assets; might they not have supposed the state of their assets more favorable than it was? I cannot answer that question favorably to the petitioners. They knew no other word could represent their affairs than "insolvency." But they might say it was only a temporary insolvency, and that they might reasonably hope for improvement in the state of their assets, and for assistance from their friends, excusing, if not justifying, their continuing to transact business. However, from the statement in the books, and other evidence, as rational men they could not, and, in point of fact, they did not, consider their situation as one of hope. This, then, was their situation in 1849. They continued, however, to carry on business, to issue notes, and to receive deposits from rich and poor till 1851. Then, it is to be asked, "Did their position in that interval improve?" The answer upon the evidence is, "It did not;" and this includes in it the fact that they were, during the whole of that time, trading while deeply insolvent. Consistently, then, with the gentler estimate of their conduct which any man would wish to take, and attributing it to fear of exposure, — to the dislike which most men have of looking at what is disagreeable, — to the weakening nature of difficulties, — these gentlemen went on. It is not necessary to characterize their conduct by any harsh term, for who in a state of success and prosperity shall venture to say what would be his own conduct under similar circumstances? "Let him who standeth, take heed lest he fall." Still, the interests of society at large preclude the exercise of any private feelings, and require that such conduct should be marked with reprehension; and we have no doubt that we are acting rightly in affirming the decision of the learned commissioner, of the correctness of whose judgment no doubt ought to be entertained. Let the appeal be dismissed; but, the assignees and opposing creditors consenting, let the bankrupts have protection. My own impression is, that protection will be available for all purposes; although I do not bind myself to that expression of opinion.

*Swanston* applied for the costs of the assignees to be paid out of the estate.

*Bacon* made a similar application as to the costs of the opposing creditor.

After some discussion on the latter point, an order was made for the payment of the assignees' costs out of the estate, and the assignees not opposing, for the payment of 50% out of the estate for the opposing creditor's costs.



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*Ex parte Sherlock; In re Sherlock.*

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*Ex parte SHERLOCK; In re SHERLOCK.*<sup>1</sup>

July 28, 1852.

*Bankrupt Law Consolidation Act, 1849, s. 198—Certificate Meeting.*

The commissioner has authority under the 198th section of the act to appoint a sitting for the consideration of the grant of a certificate to a bankrupt, although the bankrupt does not make the application himself.

In this case Mr. Commissioner Stevenson had refused the bankrupt his certificate; and also refused him protection; and the case came before the court, in the form of an appeal from his decision. The only point, however, worth notice, turned on the question, whether the commissioner had jurisdiction under the statute, 12 & 13 Vict. c. 106, s. 198, to appoint a meeting for the consideration of the grant of the certificate, without the bankrupt's own application for the same.

*Swanston and Renshaw*, for the petition of appeal. Independently of the merits of this case, the decision of the commissioner cannot stand, because he had no jurisdiction to call the meeting for the consideration of the question of the grant or refusal of the certificate to this bankrupt. This meeting was held not only without the application of the bankrupt, but was held against the argument and protest of both his attorney and his counsel. The certificate is a privilege, and has been so treated by this court in some recent cases, and if the bankrupt does not seek to have the benefit of it, or does not esteem it a benefit, the commissioner possesses no authority to call a meeting in order to thrust that benefit upon him; and if that be so, surely he has no jurisdiction to call a meeting, and thereat refuse the bankrupt what he does not ask. The question turns upon the true construction of the 39th section of the 5 & 6 Vict. c. 122, and the 12 & 13 Vict. c. 106, the Bankrupt Law Consolidation Act, 1849, taken together. The latter statute repealed the former act. By the 39th section of the 5 & 6 Vict. c. 122, s. 39, it is enacted, "That it shall be lawful for the court authorized to act in the prosecution of any fiat in bankruptcy already issued, or hereafter to be issued, on the application of the bankrupt named in such fiat, to appoint a public sitting for the allowance of such certificate, of the purport whereof twenty-one days' notice shall be given in the London Gazette, and to the solicitor of the assignees; and at such sitting any of the creditors of such bankrupt may be heard against the allowance of such certificate; but it shall not be requisite for such certificate to be signed by any of the creditors of such bankrupt; and such court, having regard to the conformity of the bankrupt to the laws relating to bankrupts,

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 36.

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*Ex parte Sherlock; In re Sherlock.*

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and to the conduct of the bankrupt as a trader, before as well as after his bankruptcy, shall judge of any objection against allowing such certificate; and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require: Provided always, that no certificate shall be such discharge unless such court shall, in writing under hand and seal, certify to the Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fullness of such discovery, and unless the bankrupt make oath in writing, that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such court." Then, to turn to the 198th section of the Bankrupt Law Consolidation Act, it will be found as follows, "That forthwith after the bankrupt shall have passed his last examination, the court shall appoint a public sitting for the allowance of his certificate (whereof, and of the purport whereof, twenty-one days' notice shall be given in the London Gazette, and to the solicitor of the assignees), and at such sitting the assignees or any of the creditors of such bankrupt who shall have given to the registrar of the court three clear days' notice in writing of his intention to oppose, may be heard against the allowance of such certificate; and the court, having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse, or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." Now, although according to the 39th section of the repealed statute, 5 & 6 Vict. c. 122, it is enacted expressly that the application for the certificate must be made by the bankrupt himself, and there is not the same enactment in the 198th section of the Bankrupt Law Consolidation Act, still, upon a fair construction of that section, it was evidently contemplated by the legislature that the certificate meeting should be held only on his application. In the last act it is enacted that notice of the sitting on the allowance of the certificate is to be given to the solicitors of the assignees, and the assignees and the creditors are to give to the registrar three days' notice of their intention to oppose the allowance of the certificate; but nothing is said about notice being given to the bankrupt, the person most interested in the proceeding—an omission which evidently shows that it was considered by the legislature that he was to take the initiative in calling the meeting. Notice to him was unnecessary, and if it were not so it might lead to very great injustice. The certificate is, as already has been said by one of your lordships, a privilege to be conferred upon bankrupts in certain cases, and it would be no hardship to the creditors that the question of the certificate should not be

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*Ex parte Dufaur; In re Dufaur.*

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taken into consideration, because, by the bankrupt remaining without his certificate, all his property, and he himself personally, would be liable to their demands. On the other hand, a commissioner had no authority to call a meeting for the purpose of granting or refusing a certificate, which the bankrupt did not ask, and when, perhaps, actuated by honest notions, he might desire that his liabilities should remain undiminished.

*Bacon and Speed*, for the assignees, were not called on.

Knight Bruce, L. J. The opinion of both of us, on the true construction of the 198th section of the Bankrupt Law Consolidation Act, especially when compared with the 39th section of the statute 5 & 6 Vict. c. 122, — and I will say, independently of that statute, — is, that the bankrupt's application is not necessary to give the commissioner jurisdiction; that is our opinion on the question of the commissioner's jurisdiction.

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*Ex parte DUFAR; In re DUFAR*<sup>1</sup>

June 30, and July 8 and 10, 1852.

*Bankrupt Law Consolidation Act, 1849 — Trading — Scrivener.*

A solicitor was adjudicated bankrupt as a scrivener, on evidence clearly establishing the fact; on appeal against the adjudication, he was examined, and the court being satisfied that, upon the additional evidence, he was not a scrivener within the meaning of the bankrupt law, annulled the adjudication; the lord chief justice expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs.

THE bankrupt in this case, Mr. Antonine Dufaur, carried on business, in partnership with Mr. Blakeney, down to March, 1851, when it was dissolved. On the 22d of May, 1852, a petition was presented by Timothy Fogarty and Julia Regan, for an adjudication against him; and, on the 26th of the same month, he was adjudged a bankrupt. On the 2d of June the bankrupt, by his solicitor, appeared before Mr. Commissioner Fonblanque, to show cause against the adjudication, when the cause was disallowed, and the adjudication confirmed. The bankrupt did not submit or tender himself for examination before the commissioner. The case now came before this court, on a petition of the bankrupt, alleging that he was not a trader, within the true intent and meaning of the bankrupt laws, and that the decision of the commissioner was erroneous, for that the adjudication was invalid, on the ground that the proof of the trading

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 38.

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*Ex parte Dufaur; In re Dufaur.*

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was insufficient to support it, and it prayed that the adjudication might be annulled.

The evidence on which the adjudication was made was that of H. Stanley, who had been managing clerk of, and F. W. Dolman, who had been articulated to, the bankrupt. The former deposed that, from 1843 to 1847, Dufaur exercised the trade, business, or profession of a money-scrivener, receiving other men's moneys and estate into his trust or custody, and making merchandise thereof; and sought and endeavored to get his livelihood thereby, as others of the same trade or business usually do; that the business of Dufaur, and of Blakeney, his partner, consisted for the most part of the procurement and advance of moneys by way of mortgage and annuity, and occasionally for the discount of bills of exchange, for parties introduced to Dufaur, as requiring advances of moneys; that Dufaur so applied moneys in his hands, and which were intrusted to him for the purpose of finding securities for the same; that among several of such parties so intrusting their moneys, were a Mrs. Browne, and Messrs. Basham & Blakeney, the trustees of Mr. and Mrs. Browne's settlement, a Mr. Cross, and a Mr. Williams and others. The deponent then proceeded to set out items of a bill of costs, for one particular mortgage transaction, partly as follows: "attending Mr. S. jun., with reference to the trust-fund, and raising of 250*l.* thereon," and "upon Mr. G. Hunter, who agreed to advance the same. Drawing memorandums," &c., (this loan went off.) "Attending upon Mr. S. sen., who proposed that 530*l.* should be raised by way of mortgage, to pay off, &c., and begged me to write to Mr. S. jun. fully thereon, explanatory of the proposed transaction, and for his assent." "Attendances on Messrs. Basham & Blakeney, proposing security to them for 550*l.*, when they agreed to advance the money, provided the security was unobjectionable." "Attending in the city to sell out stock."

Mr. Dolman deposed at the outset in the same technical manner; and then said, "Dufaur has been in the constant practice of receiving the moneys of parties, the same being lodged in his hands by clients and others, for the purpose of being invested in securities, and for the purpose of finding securities for the same, and, upon the money being invested, he has charged not only for the mortgage deed and conveyancing part of the business, but also certain fees, bonuses, or compensation for such procurement of the said moneys; but, in particular, the said Dufaur has invested moneys intrusted to him; placed, or left in his hands by Dr. E. Blakeney, and a Mrs. Mary Browne, for the purpose of being invested in securities." . . . "That Dufaur, in an affidavit he made in April, 1851, swore that he and his partner had been for the last four years concerned for the said Mrs. Browne, in investing her money on mortgages, or other securities; and that, in the course of such employment, they had recommended various investments to her, all of which had been accepted by her, and that she had from time to time left it to Dufaur and his partner to find fresh securities for such sums of money as might be paid off. That in answer to a letter from Dufaur to her, dated the 13th of

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August, 1850, informing her of one sum of money having been paid off, and that another would be so soon, she wrote, on the 4th of September, saying, 'I shall feel obliged by your investing the money for me in any way you may think desirable.' That 500*l.*, or thereabouts, was agreed by Dufaur and his partner to be advanced on behalf of Mrs. Browne to Lieut. Newenham." This deposition also referred to various accounts and bills of costs.

In the course of some disputes between Dufaur and Dolman, and of an investigation of the matters relating to Mrs. Browne, it had been asserted that the consent of Mrs. Browne was obtained to the loan of 500*l.* to Lieut. Newenham, and she made an affidavit in the Court of Queen's Bench as follows: "25th of April, 1851. She has never been consulted, either by the said Dufaur or Blakeney, on the subject of a proposed advance of any portion of her moneys to Lieut. Newenham; no mention has ever been made by either of them of such advances being required or contemplated, nor have the particulars or nature of any interest or property whatever, proposed as a security for the loan of 500*l.* or any other sum of money, by the said Lieut. Newenham, been at any time mentioned to her; and, further, that had any such proposal been made to her she should most distinctly and peremptorily have declined to assent to any such application of her moneys." This affidavit was read in evidence by the consent of the petitioner, to save the expense of an oral examination.

The affidavit of Dufaur stated his having been for twenty-one years past in practice as an attorney and solicitor; that he never exercised the trade, &c., (a denial of the technical passages in Stanley's and Dolman's depositions); that his business consisted of the usual business of an attorney and solicitor, namely, that of conducting affairs in common law, chancery, conveyancing, and all other branches of his profession; that some, but not the most part of his business consisted in the preparation of mortgages and annuities granted to clients; that he had not, since 1844, been in the habit of procuring the discount of any bills of exchange or promissory notes for clients, or any other persons, but, &c., (then followed an admission of two instances); that he had not, since 1844, invested any client's money, or any part thereof, in the discount of any bills of exchange or promissory notes, but, on the contrary, had most studiously avoided doing so; that moneys had not been intrusted to him, nor to him and his late partner, for the purpose of finding securities for the same; he had never advanced the moneys of Mrs. Browne, (repeating the names,) nor the money of any other client by way of mortgage or annuity, without first communicating to them the nature of the security on which he proposed to advance the same, and procuring their sanction, authority, and consent thereto. The affidavit then entered into a full explanation of several particular matters, and, in each case, stated the assent of the lender to the security, and contained the following passage: "I say that the statement in the examination of F. W. Dolman, sworn in this matter, that I have been in the constant habit of receiving the moneys of parties, &c., (following the words of the deposition,) is utterly untrue; for I say I have

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never had money lodged in my hands, by clients or others, for the purpose of finding securities for the same."

In one of the accounts, — No. 6, "capital account," on which reliance was placed as proving that money was placed in Dufaur & Blakeney's hands, for the purpose of investment, at their discretion, were items such as these :—

	£	s.	d.
To sums of money drawn out by Mr. Blakeney, for his own private purposes, between, &c., out of 1,202 <i>l.</i> 3 <i>s.</i> 1 <i>d.</i> , . . . . .	187	14	6
To Best's mortgage, . . . . .	200	0	0
To Regan & Fogarty, in part of 600 <i>l.</i> agreed to be advanced to them on mortgage, . . . . .	420	0	0
To Mitchell, in part of 800 <i>l.</i> agreed to be advanced to him on mortgage, . . . . .	411	0	0
To Newenham, in part of 550 <i>l.</i> agreed to be advanced to him by way of annuity, . . . . .	420	0	0

On the other side of the account appeared, among others, these items :

	£	s.	d.
By cash, Salamans, . . . . .	1,202	3	1
By cash, Beaver, . . . . .	200	0	0
By cash, Stevens, . . . . .	250	0	0
By cash, Rymer, . . . . .	400	0	0

Mr. Dufaur was examined and cross-examined at great length, and in the course of it he explained this to be, that Dufaur & Blakeney had received moneys belonging to Mrs. Browne, which had been lent on mortgage, and upon being paid off by Beaver, Stevens, and Rymer, the amounts were paid to Dufaur & Blakeney as the solicitors of Mrs. Browne. As to the item 1,202*l.* 3*s.* 1*d.* and the 187*l.* 14*s.* 6*d.*, as drawn out by Mr. Blakeney, Mr. Dufaur accounted for it thus : Mrs. Browne was present when Salamans paid the money, and requested her solicitors to put the money for safe custody into their bankers', which they did, and the 187*l.* 14*s.* 6*d.* was drawn out by Mr. Blakeney, the partner, upon some understanding or agreement (unknown to him, Dufaur,) between him and Mrs. Browne, they being brother and sister. The 1,202*l.* 3*s.* 1*d.* was never in the hands of the firm for any other purpose than for safe custody, Mrs. Browne not having any banker. He also swore that on every occasion when he advanced money for a client, he had the authority of that client to lend it on a particular security. Mr. Dolman was also examined, and swore that while in Dufaur's office he knew the nature of his business, and that his chief business was to procure money "for money agents," that is, "for persons who are employed to borrow money." In the bills of costs relating to Mrs. Browne's money, it appeared that the only charges made by Mr. Dufaur were the usual solicitor's charges. In one or two particular instances in the bills, charges or commission on the receipt of rents appeared to have been made. The decision of the court is founded on the case of Mrs. Browne, and therefore the other cases referred to in the evidence are omitted here.

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*Swanston and Bagshawe*, for the appeal. In order to support the adjudication of the commissioner, it must be shown that the alleged bankrupt was a scrivener when the petitioning creditor's debt was contracted, in 1849; and beyond this, it must be shown that scrivening was a general course of dealing of Mr. Dufaur. Did Mr. Dufaur, according to the definition in the statute 6 Geo. 4, c. 16, and continued by the present bankrupt law, "receive other men's moneys or estates into his trust or custody?" Upon the evidence he most unquestionably did not. That he was not a "genuine scrivener" is plain, for we learn from the Lord Chief Justice Gibbs, in the case of *Adams v. Malkin*, 3 Campb. 539, that the last of that class was one Jack Ellis, a contemporary of Dr. Johnson. Then, was he an attorney employed by his clients not simply in his character of attorney, but as a money agent, to invest their money upon securities at his own discretion? Assuredly not. Mr. Dufaur's evidence disproves this in his explanation of account No. 6, and the very items relied on in the depositions on which the adjudication was made disprove instead of support it. What Mr. Dufaur was, was an attorney who received money as a channel to convey it from Mrs. Browne and other persons, to lend it to other persons, making his charges as an attorney, and, in some instances, charging commission, yet certainly not a scrivener; for, as the Lord Chief Justice said in the before-mentioned case, "this is only having incidentally, on particular occasions, the money of his clients to lay out for them." In every case it is to be ascertained whether the business transacted was incidental to the character of an attorney, or distinct from it; for to constitute him a scrivener, the attorney must get the money into his hands in a course of trading, and it is impossible to deny that Mr. Dufaur did not receive moneys in any such manner as trading, or to deny that he did transact the business in his character of an attorney. *Ex parte Bath*, Mont. 82; *Malkin v. Adams*, 2 Rose, 28; 2 Ves. & B. 31; *Ex parte Paterson*, 1 Rose, 402; *Hutchinson v. Gascoigne*, Holt, 507.

*Bacon and Cooke* were for the opposing creditors, and the official and trade assignees.

July 10. LORD CRANWORTH, L. J. Mr. Antonine Dufaur, a solicitor of many years' standing and practice, being adjudicated a bankrupt, as a scrivener, within the meaning of the bankrupt law, appeals from the decision of Mr. Commissioner Fonblanque, who has, upon the evidence before him, so adjudicated. That evidence was of two clerks who had been in Mr. Dufaur's employ, and who said what, if true, was conclusive, and left the commissioner no alternative. It is to be remarked that Mr. Dufaur did not tender himself for examination before the commissioner, and doubtless if he had, that learned person would have taken his examination, and he now demurs to the result of the evidence. The evidence which was before the court below, as to the practice of scrivening was, as I before observed, the testimony of two clerks who were formerly in the service of Mr. Dufaur, and, if their evidence is to be relied upon, no doubt the prac-

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*Ex parte Dufaur; In re Dufaur.*

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tice of scrivening, within the meaning of the bankrupt law, is made out. The question is, whether the evidence of these two persons is to be relied upon? They say that the general practice of Mr. Dufaur's business was the receipt of moneys from clients, and the laying of it out upon securities at his discretion, and from time to time, as he found convenient opportunity. But their evidence is general, not specific, excepting to a certain extent as to the dealings with the moneys of Mrs. Browne. This court is not at liberty to rely upon general allegations, unsupported by specific facts or instances. If such general evidence were to be relied on, no doubt can be entertained that Mr. Dufaur is a scrivener who receives other persons' money into his custody or trust in the manner stated in the bankrupt law. The trade of a scrivener has ceased in this country for two or three centuries, and its business is now divided between bankers and brokers. As bankers are now by statute declared to be within the operation of the bankrupt law, it never matters whether a banker has traded as a scrivener or not; but as attorneys, as such, are unquestionably excluded from the operation of the bankrupt law, it is frequently, as in the present case, very important to see whether an attorney who is sought or seeks to be made a bankrupt can be so made by the fact of his acts of scrivening. In the case of *Adams v. Malkin*, it was said by Chief Justice Gibbs, "At the present day, the banker occupies one department of the business of the scrivener, by being the depository of the money, and the attorney the other, by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money-scrivener, though on particular occasions he incidentally has the money of his clients to lay out for them. In order to make a man a money-scrivener, he must carry on the business of being trusted with other people's moneys to lay out for them as occasion offers. It is not being sent with the money of his client, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a money-scrivener. In that part of the transaction, he is no more than a person employed to fetch and carry. Having negotiated the loan, and drawn the deeds, his happening to receive and pay the money is incidental to his business of an attorney. Nor, if on one or two occasions money were deposited with him to lay out, would that constitute him a money-scrivener. He must be carrying on generally the business of a money-scrivener. That must be part of his known occupation." I do not quarrel with the law of that case, — the question is, whether Mr. Dufaur is brought, upon the evidence before us, within it. The evidence shows that from 1847 to 1848 he received moneys of Mrs. Browne. Arrangements were made before the money was received. Several cases were relied on, but no evidence on more than one or two, and Mr. Dufaur denies that any other ever existed on which the question could arise. In the absence of any such evidence, I think we are bound to believe Mr. Dufaur, and we must rely on Mrs. Browne's case, if any case can be relied on. Even supposing the evidence of the two late clerks of Mr. Dufaur, with relation to Mrs. Browne's



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case, were to be taken as true, still I am of opinion that it will not be enough, for the case of that lady is most peculiar. In every instance but one of the investment of her property, the security was agreed on beforehand; and if it had not been so, still, if the facts are true of her being the wife of a former partner of Mr. Dufaur, and the sister of a subsequent partner, and that he has been wholly confided in by her as to the disposal of her money, they will account for his dealing with it, and we should not, in any case of such description, hold Mr. Dufaur to be a scrivener. Lord Eldon and Lord Chief Justice Gibbs have both plainly laid down that the fact of scrivening, isolated acts of scrivening, is not sufficient to support a commission against an attorney as a scrivener, but it must be shown that the general course of his business is of that nature. It is not to be forgotten that in all Mrs. Browne's investments Mr. Dufaur charged his attorney's costs only. Lord Chief Justice Gibbs says, in the case I have before referred to, "Though an attorney may have incidentally acted as a scrivener, that is not sufficient; though money may have been deposited with him, for which he was afterwards to seek a borrower, a few insulated instances of that sort occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws; for that would not be 'using the trade or profession of a scrivener, receiving other men's moneys or estates into his trust or custody.'" And Lord Eldon, in *Ex parte Paterson*, observes, "The next question is, as to the trading as scrivener. That does not depend upon the fact, whether the bankrupt has or has not occasionally done acts which a scrivener peculiarly and properly would have done; not upon what he may have done upon one day, and what upon another, but upon his intention generally to get a living by so doing." Now, this requirement is not proved on the evidence before us to exist in the present case. The few cases of Mrs. Browne, and Dr. Blakeney and others, so far as they go, are exceptional, and there is no evidence of a general intention on the part of Mr. Dufaur to get money by scrivening, and these cases are explained by the particular and intimate connection existing between the parties. On the whole, I am of opinion that the examination of Mr. Dufaur, whose evidence was not before the commissioner, has shown that he is not a scrivener within the meaning of the bankrupt law, and the adjudication must, therefore, be set aside; but I do not consider Mr. Dufaur entitled to any costs, as he did not tender himself for examination before the commissioner. It is not necessary to decide any thing as to any charges made by Mr. Dufaur for commission, for the case does not depend on that. He must undertake not to bring any action.

KNIGHT BRUCE, L. J. The only possible objection to the adjudication the commissioner has made, and which upon the only evidence before him he was bound to make, is, that Mr. Dufaur is not, and has not been, a scrivener, within the meaning of the bankrupt laws. Considering that the petitioner did not offer himself before the commissioner for examination,—considering how he has conducted himself—

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*Ex parte Gull; In re Gull.*

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considering that he is probably or certainly insolvent, I was at one time disposed to refuse to interfere to assist him against the adjudication, and to require that an action should be brought. Upon the whole evidence now before the court — evidence not before the commissioner — I agree with the conclusion of my learned brother; but I agree because I find the law, as applicable to the facts proved, is in support of that view, and I agree only because of authority by which I do and ought to feel myself bound, and not on my own view of the question. The authority is that of great judges and eminent men, and is such as I consider myself bound by. I also agree with Lord Cranworth in holding that Mr. Dufaur can have no costs, and that he must undertake not to bring any action.

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*Ex parte GULL; In re GULL.*<sup>1</sup>

July 9 and 10, 1852.

*Bankrupt Law Consolidation Act, 1849 — Certificate.*

A, a tallow-broker in business with B, became bankrupt, and on application for his certificate had the same suspended for two years, and then to be of the third class. The case of suspension was supported by the commissioner on two grounds; first, that the bankrupt had fraudulently induced a creditor to forbear enforcing payment of a certain sum, by withholding information known to him and not known to the creditor, and which, if known, would have induced the creditor to enforce payment; the other case was for receiving money for goods alleged by the bankrupt to have been purchased, and then re-transferring the goods to the person of whom he bought them, so that the creditor did not receive the goods, and lost his money. The lords justices were of opinion that the withholding of information, or the silence of the bankrupt regarding that information, was not dishonestly intended in the one case, and the act by which the goods were re-transferred and the money lost in the second case was, upon the evidence before the court, not fraudulent, so far as the petitioner was concerned, and therefore they granted an immediate certificate of the first class.

In this case the bankrupt, Mr. Gull, carried on business in partnership with Mr. Wilson, as Russia brokers, in Old Broad Street, and they having been adjudicated bankrupt, applied to the commissioner, Mr. Fonblanque, on the 24th of May last, for their certificates; but by an order, dated the 2d of June, the certificate of Mr. Gull was suspended for two years, and then was directed to be of the third class, and the bankrupt was to be in the meantime without protection. The present appeal was presented against this decision. The certificate of Mr. Gull was opposed on many grounds, but on the appeal only two were insisted on, and they are distinguished here by Mr. Mollett's case and Mr. Kelly's case.

It appeared (from statements made, at the hearing of this appeal, by the official assignee and by the solicitor for the creditors' assignees)

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 43.  
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*Ex parte Gull; In re Gull.*

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that Mr. Gull, who had been many years in business, failed in 1841, when he paid 4s. in the pound, and his failure was then attributed to the stoppage of large houses with whom he had dealings. He continued in business until Mr. Wilson joined him with 2,000*l.* capital. Mr. Mollett's case was thus stated by the commissioner in his judgment:—"Mr. Mollett having sold a large quantity of tallow, as to fifty casks of which a specific objection attached, Gull obtained from Mollett's brother, before he had paid for the tallow, a delivery order. Mollett's brother inadvertently gave that order sooner than he ought. Another brother, whose duty it was as bookkeeper to look to these matters, seeing that the proper time of payment had arrived, called upon Gull for such payment, and then he was met by an application for time. Gull then went to the elder Mollett, and not disclosing that he had not only got the delivery order, but that he had sold the tallow, and been paid for it, obtained the forbearance of the payment of 700*l.*, which Mollett most distinctly swore he would not have granted but on the terms of the tallow being deposited as security, and in the belief that the tallow was at that time deposited at the wharf, and, consequently, Mollett retained, probably more as a memorandum than security, the delivery order, which he believed to be the only delivery order. As respected that transaction, the evidence of Mollett himself, of Robert Mollett, and of Isaac Mollett, was clear, consistent, and distinct, and in a great measure corroborated by the evidence of Wilson; but Gull, on the contrary, repudiated the transaction. He (the commissioner) could not say that either in its circumstances, or in the manner, the evidence of Gull was such that he could balance it against the conjoint evidence of the three Molletts, and especially with the evidence of the bankrupt Wilson, who swore distinctly (and he had no reason to doubt the truth of his assertion) that he repeatedly brought to the notice of Gull that he had not paid Mollett for the tallow, but he put him off by saying that Mollett did not want the money. He (the commissioner) must, therefore, come to the conclusion that the case of having obtained the forbearance of the payment of 700*l.* was under the false pretence that the tallow was still lodged as security; and was a most fraudulent act."

The case of Mr. Mollett was at the present hearing represented to be this: the delivery note for the fifty casks was sent to the bankrupts on the 1st of April, and by them transferred the same day to the persons for whom the tallow had been bought, but no demand for payment was made by Mollett on that day, and no payment was then made. The delivery order for the remaining thirty-two casks was sent to the bankrupts on the 8th of April, and paid for by them on the same day, and on the 15th of April a second delivery order for the fifty casks was sent and returned by the bankrupts to Mollett; and on the 19th, application being made for payment by Mollett's brother, Gull asked that the 700*l.* might remain as a loan, he paying 100*l.* on account, which was agreed to by Mollett, and the 100*l.* was paid. Thus matters stood until November, and although transactions between the parties took place to above 20,000*l.* no notice was taken by any one of the 700*l.* Mollett, in his affidavit, swore that he

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*Ex parte Gull; In re Gull.*

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had allowed the money so to remain, in the belief that the fifty casks had not been delivered, but he did not state that such a representation of his belief had ever been made to the bankrupt. Mr. Gull swore that he never made any false representation, and that he was not aware until after the failure that Mollett was acting under such an impression.

With regard to Mr. Kelly's case, the matter was thus stated in the commissioner's judgment: "Kelly ordered from Dublin twenty-five casks of tallow. On the 13th of November the bankrupts sent him word that they had purchased the tallow for him, and Kelly thereupon remitted to them 330*l.* which arrived on the Saturday after, and was acknowledged by the bankrupts to have been paid into their hands on the 17th of November. Nothing could be more clear than that the bankrupts, after having written to Kelly, to tell him that they had bought twenty-five casks of tallow on his account, and after having received payment, had no right, and could have no right whatever to dispose of that tallow; it was as much Kelly's as if it had been delivered in Dublin. Nothing until the bankruptcy showed but that the ostensible ownership was in Gull and Wilson, nor made any alteration in the title to the property, and it was doubtful if even bankruptcy made any alteration in the title to it. Independently of the gross irregularity—to say no more—of this transaction, it took place at a time when the bankrupts, and especially Gull, must have known that they were, if not insolvent, threatened with immediate insolvency. The immediate cause of failure was, that they had very large transactions with some Scotch houses. Now, about that time some of the Scotch houses began to show symptoms of distress, some as early as August, but several in September, and at the latter end of October, the largest had actually failed. The transactions with these houses extended to more than 30,000*l.*, for which accommodation bills were given. It was clear, therefore, that when Gull and Wilson sold Kelly the tallow they had good warning that they were insolvent; and so pressing was that warning that on the 17th of November, the Monday after the Saturday on which they received Kelly's money, the bankrupt Wilson withdrew all the money remaining at the bank, and thereby occasioned an immediate stoppage of the house. He (the commissioner) must, therefore, conclude that Kelly's case was abundantly proved, and that it was a case of fraudulently appropriating property which did not belong to them." The case as to Mr. Kelly was thus explained by Mr. Gull. The money was remitted on the 15th of November, in the absence of Gull, and was paid into the bankers', and on the 17th Mr. Wilson, for some cause unexplained, drew out all the money from the bankers, and being by this act of Wilson unable to pay for the goods he had purchased for Kelly, he re-transferred them to Palmer & Co., from whom they were bought. Beyond this, from Gull's uncontradicted affidavit, it appeared that before the certificate meeting Kelly called upon him and offered not to oppose if he would make an arrangement for paying him. This Gull refused, and Kelly opposed the grant of his certificate; and, subsequently, after the petition of appeal

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*Ex parte Gull; In re Gull.*

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was presented, Kelly again called and asked what he, Gull, was going to give him not to oppose the appeal. Upon these materials, and upon these points, the petition was heard.

*Swanston* and *Roxburgh* supported the petition of appeal.

*Bacon* and *Cooke*, on behalf of the creditors *Mollett* and *Kelly*, supported the decision of the commissioner.

Mr. Graham, the official assignee, and Mr. Murray, the solicitor to the creditors' assignees, were questioned by the court, and stated that they attributed the failure of Mr. Gull to the losses occasioned by the failure of houses with which the bankrupts were extensively engaged; they believed there had been no intentional irregularity in the matter of *Mollett* or *Kelly*; that there had been no extravagant expenditure in the personal outlay of Mr. Gull; that the failure was attributable to misfortune in the proper sense of the term, and that there had been no reckless or imprudent dealing.

*Swanston* was not called on to reply.

KNIGHT BRUCE, L. J. This is a petition of appeal from an order of the learned commissioner in bankruptcy, Mr. Fonblanque, suspending the certificate of the petitioner for two years without protection, or, at least, without protection for a considerable portion of time; and it comes before the court under unusual circumstances. The learned commissioner appears to have proceeded upon five or six distinct grounds, but only as to two of them has any evidence been brought to our attention, or, indeed, before us; and the others have in effect been tacitly disclaimed by the opposing creditors, and more than tacitly by the assignees, the latter, most certainly, and the others, as I believe, represented by solicitors of reputation, standing, and experience. It would not be reasonable to suppose or suspect collusion; nor am I inclined to think that merely on the two grounds I have already mentioned as those to which the evidence in the contention before us has been confined, would the learned commissioner have made the order he has made. We are bound, as we conceive, to confine our attention to those two grounds, one being that the debt of Mr. Thomas Kelly was fraudulently contracted by the bankrupts, and the other, that they, or the petitioner, fraudulently induced another creditor, Mr. John Mollett, to refrain from enforcing or pressing his claim, not, however, by way of contract, or in such a way as to bind Mr. Mollett. They are the two opposing creditors; for the assignees, though watching the case, take no part as assignees against the petitioner, in whose favor, rather than against, the statements made to us in court, by the official assignee, and Mr. Murray, the assignees' solicitor, have been made.

With regard to Mr. Kelly, he has, since the bankruptcy, shown such a want of the most ordinary attention and propriety with regard

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to his debt, as almost to raise a case of personal charge against him; but we should be considered as justified in dealing with this case as if he had not acted with the gross incorrectness with which he has acted, and we do so. I think, however, whether assuming or not assuming perfect integrity on his part, that his case fails. A quantity of tallow was bought, or to be bought, on his account, but he had not the tallow, and he charges the bankrupts or the petitioner, one of them, with fraud, — in this respect, I think, on the evidence, without foundation, — for I believe the money was received by them *bond fide*; at least, *bond fide* so far as the petitioner was concerned, and that it was not for want of integrity on the petitioner's part that Mr. Kelly had not his tallow. Certainly, the liability of a trader for the acts of his partner is sometimes carried to a great extent, but to apply it to the principles which regulate debt would be rather too strong. I believe the petitioner, when he made his communication, did honestly the act which prevented Mr. Kelly from having his tallow; and whatever ought to be thought of Mr. Wilson's conduct, there can be no charge of fraud towards Mr. Kelly, by Mr. Gull, to deprive him both of money and goods in respect of which the money was sent; all which I might have regretted now, had his subsequent conduct been different. His case, I repeat, fails on every ground, and under whatsoever view.

The case of Mr. Mollett stands thus — he refrained, he says, from enforcing his demand, and from pressure, in consequence of the fact, known, as he asserts, to the petitioner, and unknown to Mr. Mollett, and which, had he known, he would not have acted on. But it is neither proved nor asserted that the petitioner made any false statement or misrepresentation. The complaint is, that he was silent. It is true that instances may well be in which silence may be equivalent to actual falsehood. Is this one? I think not. The question is, whether the facts in evidence ought to lead to the inference that the silence could not have been that of an honest man, or was ill intended, or for an unfair motive. If Mr. Mollett was deceived or misled at all (of which I am not by any means persuaded) he was not so by or through any improper conduct or intention on the part of the petitioner, whose account and explanation of the matter I believe. But I have doubted considerably whether, on the composition made some years ago with the petitioning creditors, that we heard yesterday from Mr. Murray and the official assignee, Mr. Gull's certificate ought to be one of the first or second class; I have come to the conclusion, however, that a case is not made out for depriving him of his certificate of the first class, which may, I think, consistently with the interests of society, with the rules of law, and with the merits of the litigants before us, be at once granted.

LORD CRANWORTH, L. J. I have nothing to add, except to entirely concur in the judgment delivered by my learned brother. We both arrived at the same conclusion, and there was only one doubt, and that was as to the class of certificate, and I am very happy that any doubts on that subject are removed. I do not mean to throw on

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*Ex parte Martyn; In re Martyn.*

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him the responsibility of giving the certificate of the first class, for, on considering the matter, we thought that a case had not been made out for depriving the party of the certificate of the first class. The refusal must be reversed, and a first-class certificate immediately granted.

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*Ex parte MARTYN; In re MARTYN.*<sup>1</sup>

May 7, 1852.

*Bankrupt Law Consolidation Act, 1849 — Certificate.*

E. M. and H. M. purchased a business of their brothers, but it was not paid for. E. M. attended to the accounts, so far as they were attended to, and H. M. performed the duties of traveller to the business. E. M. and H. M. on various occasions raised money by deposits of goods, and paid 60l. per cent. for discount. H. M. ordered goods one day and pledged them on the next. The brothers, the vendors of the business, sued for the purchase-money and issued execution on a judgment in the action. Both E. M. and H. M. were adjudicated bankrupts, and the commissioner refused them their certificates or protection, on the ground of not keeping proper books of account (as to E. M., destruction of books), obtaining goods for the purpose of pledging, and pledging them, and fraudulent preference to the brothers who sold the business. H. M. appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books, and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The lords justices were of opinion that there was no wrong intention as to the books or the pawning, and that there was pressure by the vendors, and, acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months after the adjudication.

THE petitioner in this case, Henry Martyn, carried on the business of woollen-draper, in partnership with his brother, Edward Martyn, in Aldgate High Street. They took the business in 1839 from their brothers, Thomas and Robert Martyn, for which they agreed to pay 300*l.*, and to take upon themselves a debt of 500*l.* At the date of the bankruptcy their debts amounted to 5,578*l.*, and they were liable on bills of exchange, accepted by other persons for their accommodation, in 1,845*l.*, making together 7,423*l.* A rough estimate was made of the profits (there not being sufficient books), which were calculated at 3,677*l.* The bought-ledger and the goods account were regularly kept, though the others were defective, and in fact there was no stock-book or cash-book. The property realized only 883*l.*, there being an admitted loss on it of 500*l.*, and the loss by bad or doubtful debts was about 2,000*l.* Both the brothers were adjudicated bankrupts on the 15th of December, 1851; and, on the 29th of March following, Mr. Commissioner Goulburn refused them both their certificates or any protection excepting during the twenty-one days allowed for appeal. The grounds of his refusal were four; not keeping books, destroying books, buying goods for the purpose of pledging,

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 46.

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*Ex parte Martyn; In re Martyn.*

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and pledging them, and fraudulent preference. As to Henry Martyn, who now appealed from the commissioner's decision, the second ground did not apply.

The other three points, from the evidence before the commissioner, (but which was varied before this court,) appeared to stand thus: 'Transactions with Mr. Roberts (after mentioned) were not entered in the books of account; nor were the debts due to the bankrupts' brothers for the purchase of the business; nor was a sum of money, said to have been sunk in the business, and derived, on the marriage of one of the bankrupts, from his wife. No stock-book was kept, at least no proper stock-book, and no cash-book was to be found. The matter of the pledging was this:—when money was wanted, part of the stock was taken to the house of a person named Gregory, who made advances on it at the rate of 60*l.* per cent. In addition to this, the bankrupts received advances of money at the same rate from an attorney named Roberts, on discount of their bills, but no pledges were made to him. The most important instance of pledging was, that on the 5th of August, the bankrupt, Henry Martyn, ordered of Mr. Ledgard certain goods, and on the same day he ordered other goods of Mr. Nash, and on the following morning the goods were removed to the house of Mr. Gregory, and pledged to raise money. It did not appear that any representation was made to Mr. Ledgard or Mr. Nash, but the goods were purchased in the ordinary manner as if for sale. The question of fraudulent preference arose out of the debt alleged to be due to the brothers for the purchase of the business, and the commissioner was of opinion that the transaction was one which was described in the 4th clause of the 256th section of the Bankrupt Law Consolidation Act, namely, "fraudulently, in contemplation of bankruptcy, and not under pressure from any of the creditors, with intent to diminish the sum to be divided among them." The writ at the suit of the brothers issued on the 22d of July, and judgment was signed on the 5th of August. One of the brothers required security for the debt, and that was alleged as the pressure by a creditor to justify the execution. It turned out that judgment had been signed too soon, though it was not executed till the 19th of the same month. An attempt was made on behalf of the creditors to persuade the two bankrupts to commit an act of bankruptcy before the sale under the execution could take place, upon which Edward Martyn agreed to execute an assignment, but Henry Martyn refused for a time, and when he consented the sale had already taken place and Robert and Thomas Martyn had obtained the property. The commissioner held that this was done in order to defeat the claims of the creditors, and was a fraudulent preference.

Henry Martyn, the petitioner, appealed from the decision of the commissioner, and filed an affidavit in which he swore that when he entered the business he was only twenty years of age; that his partner was eight years older; that his brother kept the books; that he was himself the traveller; that the transactions of the discounts by Roberts and Gregory were duly and regularly entered according to the usual course; that the shopman, Wilson, told him, on the 5th of



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*Ex parte Martyn; In re Martyn.*

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August, that two particular sorts of cloth were wanted for the stock, which he, Henry Martyn, accordingly ordered of Mr. Lédgard and Mr. Nash; that being informed by his brother that on the 6th of August bills to the amount of 80*l.* were falling due, and there was no money to meet them, he took these two parcels of goods, which were then unpacked, and pledged them with Mr. Gregory; that his reason for pledging these in preference to other goods was, that, the "tabs" being on them, the length, the quality, and price of them would be at once seen, and being already packed they could be the more easily removed, and that at this time he believed he was solvent, although he had no other means of raising the money to meet the bills. Wilson, the shopman, in his affidavit, stated the same facts as to the sorts of goods wanted for the stock. During the argument, their lordships offered the assignees an opportunity of having Wilson before the court and cross-examining him, but the offer was declined.

*Swanston* and *Roxburgh* supported the petition of appeal.

*Rolt* and *Bagley*, for the assignees, opposed it.

KNIGHT BRUCE, L. J. The first question is, whether it has been established against this bankrupt that he has been guilty of fraudulent conduct, or whether his conduct comes within the description of acts of impropriety beyond unskilfulness or imprudence, because, were such a case brought home to him—to any man engaged in trade—the general interests of justice and the safety of mankind would require it to be dealt with severely. Instances have been adduced in which it has been contended by the assignees, with great propriety, that the withholding of entries from the books cannot be attributed to unskilfulness or neglect, but must be attributed to bad and dishonest intentions. Upon this reliance must not be placed, for it is to be remembered that Henry Martyn, the petitioner, was not the keeper of the books, but a traveller, his brother Edward Martyn taking, or professing to take care of the book-keeping. Nor is it to be forgotten that the petitioner was partner with a brother eight years older than himself, and that when the business commenced the petitioner was only a young man of twenty years of age. I do not discover in the books or otherwise any evidence to satisfy me of the fact on which the assignees have relied, namely, fraudulent omission of entries attributable to the petitioner. I do, however, find entries of exorbitant and oppressive interest made in a general way, without day of the month or any other particulars. This, however improper, I cannot attribute to fraud or bad intention in Henry Martyn. I am clearly of opinion, and so, I believe, is my learned brother, that if fraud or bad intention in such conduct could be shown, no amount of punishment which this court has the power of inflicting could be too great to mark its sense of the impropriety of such conduct. Then, again, there is an omission of the entry of the sum they owed when they began business, and it does not appear that they kept a book in which such entry could be made. So, too, the fortune brought

*Ex parte Martyn; In re Martyn.*

by the wife of one of the bankrupts; but, however improper such an omission may be, and few things can be more improper, still I do not find it necessary to attribute it to fraud or bad intention. Then comes the consideration of the conduct of the brothers as to the execution; and upon the evidence before the court, it appears that the conduct of Thomas and Robert Martyn was rather harsh than collusive, and therefore the conclusion is that the petitioner and the other bankrupt did not permit the execution fraudulently or dishonestly. On these two grounds, therefore, namely, the defective keeping of the books and the fraudulent conduct as alleged in respect of the execution, we are not satisfied that the assignees have substantiated their case against the petitioner, Henry Martyn.

Then there is the third ground alleged against the petitioner, — and if it were established, hardly any amount of severity which the court could visit upon the bankrupt would be adequate to its gravity, — the offence, namely, of taking up goods from a tradesman apparently in the ordinary course of business, but with the view and intention to pledge them. The time of the pledging of the goods was, undoubtedly, most suspicious; but the affidavit of Wilson, the shopman, is clear and explicit, that he pointed out what goods were wanted, and they were accordingly ordered, and although we gave the assignees the opportunity of cross-examining this witness, they did not avail themselves of the offer. From this person's account the goods were wanted, and then it appears that a sudden pressure for money arose, and the goods were pledged to answer immediate necessities. Much stress has been laid on the fact of the goods pledged being the very goods which but the day before had been received by the bankrupts, but the answer given to that was plausible, and the selection of these very goods was also plausible, for the tickets or "tabs" upon them showed at once the quality, value, and quantity contained in each parcel.

There remains only this point, namely, that the bankrupts had been in very considerable difficulty for a long time; but the petitioner in his affidavit swears that he did not know that the partnership was in a state of insolvency, and as he did not attend to the books I see no reason for disbelieving him. I do not think any stress can be laid on that. Considering, therefore, the age of the petitioner when he began business, and recollecting that his elder brother was his partner, and considering that from the middle of February he was without protection, substantial justice will be done by granting the petitioner a certificate of the second class, to be dated eight calendar months from the date of the adjudication.

LORD CRANWORTH, L. J. I only add a few words to express my entire concurrence in what has fallen from my learned brother. It must not be thought that, because we differ from the conclusion at which the learned commissioner has arrived in this case, we differ from the principle on which he acted. On the contrary, it must be distinctly understood that when such a course of dealing is established as that of taking up goods with the intention of pledging them, the

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*Ex parte Glyn; In re Ashlin.*

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court will visit such fraudulent misconduct with the utmost severity. Here we are not forced to believe, and do not believe, that the petitioner had any dishonest intention, and he will, therefore, be entitled to his certificate of the class, and dated as my learned brother has intimated. I may add that if Wilson's affidavit be true, fraud is disproved, and I think it would be very unsafe to deal with the petitioner on a footing of fraud, after such a course of trading as is here proved.

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*Ex parte GLYN; In re ASHLIN.*<sup>1</sup>

April 30, and May 1 and 9, 1852.

*Bankrupt Law Consolidation Act, 1849, ss. 44, 54 — Payments to the Chief Registrar's Account — Allowance to Official Assignees.*

The 54th section of the statute having enacted that certain amounts, not less nor greater than specified amounts per cent. on the gross produce, from time to time should be paid by official assignees to the "chief registrar's account," the amount to be fixed by the senior commissioner, with the approval of the Lord Chancellor; and the chief commissioner having fixed the sums, with such approval, the court refused to interfere to alter the same; but the commissioner having made such allowances to the official assignee, as, according to the amount of the bankrupt's estate and the nature of the duties performed, were, in his opinion, just and reasonable, the court differing from the opinion of the commissioner, and the official assignee not requesting the court to fix the amount of allowance, the matter was, on this point, sent back to the commissioner for reconsideration.

THIS was a petition presented by Messrs. Glyn, Currie & Gurney, the creditor's assignees, to the estate of Mr. Spencer Ashlin, the bankrupt, by way of appeal from the order of Mr. Commissioner Goulburn, praying that such order might be discharged or varied, and that the difference between the amount actually paid to the chief registrar's fund and such sum as the court might find properly payable, might be refunded to Mr. Pennell, as official assignee, and that the commissioner might be directed to review and to reconsider the allowance or percentage allowed to Mr. Pennell, and that the difference between the sums allowed and the amount which the court should think fit and reasonable might be refunded to the bankrupt's estate. The material facts appearing upon the petition, and which were not disputed, were these: Mr. Pennell, the official assignee, had received money belonging to the bankrupt's estate to the gross amount of 20,928*l.* 17*s.* 9*d.* up to the 24th of January, 1852, which sum had been payable to him in the following way: On the 18th of November, Glyn & Co. paid over 15,539*l.* 2*s.* 6*d.*; on the 5th of December, the sum of 1,037*l.*, the amount of one bill of exchange, and on the 9th of the same month 663*l.*, amounting together to 1,700*l.*, were paid to him, and between the 18th of November, 1851, and the 24th of January,

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 49.

*Ex parte Glyn; In re Ashlin.*

1852, the day appointed for the audit of the accounts of the official assignee, he received, in twenty-three sums, money amounting to 3,689*l.* 15*s.* 3*d.*; making a gross amount of receipts of 20,928*l.* 17*s.* 9*d.*; of these twenty-three sums, fifteen were debts not exceeding 100*l.*, and amounted altogether to 444*l.* 7*s.* 5*d.*; four were debts exceeding 100*l.*, but not exceeding 500*l.*, and amounted altogether to 1,257*l.* 5*s.*; two were debts exceeding 500*l.* and not exceeding 1,000*l.*, and amounted to 1,195*l.* 0*s.* 10*d.*; and the remaining two were sums of 43*l.* 2*s.* and 750*l.*, the produce of the sale of furniture and other similar property. The official assignee, in his account, debited the estate with, among others, payments in respect of the 20,928*l.* 17*s.* 9*d.*, as follows: "To chief registrar's fees, 5*l.* per cent. on 500*l.*, 25*l.*; 3*l.* per cent. on 4,500*l.*, 135*l.*; 2*l.* 10*s.* per cent. on 5,000*l.*, 125*l.*; 1*l.* per cent. on 10,000*l.*, 100*l.*; 10*s.* per cent. on 928*l.* 17*s.* 9*d.*, 4*l.* 12*s.* 10*d.*"; these, with other sums paid to the chief registrar's account, amounted altogether to 419*l.* 5*s.* 10*d.* These, then, were the official assignee's charges and percentage up to and including the first dividend under the estate; there were six sittings only of the commissioner in the prosecution of the adjudication, for each of which 11*s.* was paid for court charges. The total receipts of the official assignees amounted to 21,584*l.* 2*s.* 9*d.*; the total payments among the creditors were 15,810*l.* 6*s.* 2*d.* The charges of the official assignee in respect of the receipts (including 20*l.* for investigating the accounts) were 197*l.* 16*s.* 2*d.*; and for distributing the 15,810*l.* 6*s.* 2*d.* among thirty-three creditors and claimants, 169*l.* 15*s.* 11*d.*, making, with the sum of 419*l.* 5*s.* 10*d.*, paid to the chief registrar's fund, a total out of an estate of 21,584*l.* 2*s.* 9*d.*; of 786*l.* 17*s.* 11*d.*

By the 54th section of the Bankrupt Law Consolidation Act, 1849, it is directed "That the official assignee of each bankrupt's estate, shall pay to the account intituled 'The Chief Registrar's Account,' such sum, not less than one eighth of a pound, and not exceeding 5*l.* per cent. on the gross produce from time to time of any such estate; such sum, within the limit aforesaid, and the time or times for payment thereof, to be fixed by the senior commissioner, with the approval of the Lord Chancellor; and the senior commissioner, with the like approval, may from time to time lessen or increase such sum, within the limit aforesaid, as may seem just and reasonable, upon consideration of the amount from time to time standing to the said account, and of the claims from time to time chargeable thereupon." The 44th section enacts, "That the court may order and allow to be paid out of any bankrupt's estate to the official assignee thereof, as a remuneration for his services, such sum as shall, upon consideration of the amount of the bankrupt's property, and the nature of the duties performed by such official assignee, appear to be just and reasonable."

Mr. Commissioner Evans, the senior commissioner, made an order pursuant to the statute, which was approved of by the Lord Chancellor (Lord Cottenham), and the scale of payments to the fund was fixed thus: Upon the first money of such gross produce not exceeding 500*l.*, 5*l.* per cent.; upon all further moneys of such gross produce above 500*l.* and not exceeding 5,000*l.*, 3*l.* per cent.; and so on,

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*Ex parte Glyn; In re Ashlin.*

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using similar words up to 30,000*l.* and down to 10*s.* per cent. and ending between 30,000*l.* and not exceeding 100,000*l.*, 5*s.* per cent. The creditors' assignees, alleging that the sum of 786*l.* 17*s.* 11*d.*, payable as before mentioned to the fund, and to the official assignee, was too large a deduction to be made out of the bankrupt's estate, and was not justifiable either by the Bankrupt Law Consolidation Act, or by the order of the senior commissioner, applied to Mr. Commissioner Goulburn, on the 27th of February last, seeking a deduction of the charges. Two points were raised before him; the first as to the rates of percentage paid to the fund; the second, as to the sums paid to the official assignee, for his remuneration. As to the first point, his honor considered that, as the charges were made according to the order approved of by the Lord Chancellor, he had no jurisdiction to vary the rate of percentage; and by an order, made on the same day, he declared that, according to the amount of the bankrupt's estate, and the nature of the duties performed by the official assignee, the remuneration which he claimed was just and reasonable. From this order the creditors' assignees now appealed. It was admitted that the duties of the official assignee had ceased at the end of January last.

LORD CRANWORTH, L. J. The question for our consideration is, I suppose, what authority is given by the 54th section of the act?

*Swanston* and *Selwyn*, for the petition. Yes, that is the question on one point; on the other point, the question will be, whether the allowance to the official assignee is not extravagantly large. As to the percentage payable to the fund, the petitioners contend that, in the first place, the chief commissioner has exceeded the authority given him by the 54th section, in making a scale of charges in the form he has. What the legislature intended was, that within the specified limits of one eighth of a pound and 5*l.* per cent., there should be one uniform amount per cent. on the whole estate of each bankrupt, paid to the chief registrar's account. Certainly, it never was intended that if the estate received consisted of 1,000*l.*, received in ten different sums, a percentage should be paid upon each of these ten sums. Therefore, what should have been charged on the estate when the whole was received, should have been that amount per cent. which was warranted by an order properly made according to the act of parliament. The expression "further sums or further moneys," in the order of the commissioner, Mr. Evans, only means "larger estate," and ought to be so construed, supposing it to be capable of a reasonable construction. All that a chief commissioner was authorized to do was to fix a scale for each estate, and not a scale applicable to separate items of each estate.

*Russell* and *Willes*, for the official assignee; and

*Daniel* and *Hopwood*, for the accountant in bankruptcy, were not called on.

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*Ex parte Glyn; In re Ashlin.*

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KNIGHT BRUCE, L. J. With all that respect for the two learned counsel who have addressed the court, which they deserve, and which is the highest, I confess myself surprised at the argument they have addressed to us. Assuming that we have jurisdiction to enter into the question of the legality of the order of Mr. Commissioner Evans, and assuming that it is legal, and only so assuming for the purpose of the question before the court, I am most clearly of opinion that he was correct, within the plain meaning of the 54th section of the statute, in framing that order as he has done. If that order is found to be inconvenient, the Bankrupt Law Consolidation Act has pointed out how it may be altered, namely, by an application to the senior commissioner, and with the approval of the Lord Chancellor. The next question is, as to the construction of that order; and what the commissioner has done is, on the estate received up to a given amount, to allow for the sums collected, 5*l.* per cent., on one sum 3*l.* per cent., on a further sum 2*l.* 10*s.* per cent., and so on; and if that is not a correct interpretation of the order approved of by the Lord Chancellor, I must confess myself not to be acquainted with the meaning of the English language as there used. The costs of the petition as to this question must be paid by those who raised it.

LORD CRANWORTH, L. J. I entirely concur with the view taken by my learned brother. It is quite notorious that allowances are made to brokers and others, not by reference to the amount of trouble entailed upon them by their services, but by way of percentage. It is by no means a novelty to pay a public officer by means of a percentage on the money he collects, for by the statute of 29 Eliz. c. 4, an act passed to prevent extortion in sheriffs and others, it is enacted, that a sheriff shall not have more than a stated amount of poundage on moneys received on executions "by reason or color of his office," and this clearly is independently of his trouble being great or small, or even none.

*Swanston* and *Selwyn*, for the petitioners, then argued the question as to the remuneration allowed to the official assignee. The allowance made to Mr. Pennell is much too great, for the bulk of the bankrupt's estate was merely handed over by the bankers to him as official assignee, so that he has undergone no labor or trouble in its collection. According to the terms of the 44th section of the Bankrupt Act, the official assignee is only entitled by way of remuneration to such sum as from the amount of the estate and nature of the duties "shall appear to be just and reasonable." If the sum which the commissioner considered proper remuneration for the official assignee be allowed, counting from the time of the adjudication to the time of the dividend, it will be equal to a payment at the rate of 1,800*l.* a year. There is still 6,000*l.* of the estate outstanding, for receiving which the official assignee will have still further remuneration, although what he could do for it will be little or nothing beyond the mere receipt of the moneys.

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*Ex parte Glyn; In re Ashlin.*

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*Russell and Willes*, for the official assignee. The allowance made to the official assignee is not too large. The duties of those officers are of the most onerous and responsible nature, and often are even the cause of involving them in considerable losses. The duties are often rendered much more difficult by reason of the fraud of the parties, and the complicated and confused state of their accounts, of which the present case is one instance, in which, to add to the embarrassment of the official assignee, the bankrupt has absconded. If, according to the general scale or rule adopted by the London commissioners, the official assignee has been highly remunerated for his labors, in other cases he is ill remunerated, and sometimes not remunerated at all, and even in some cases he has incurred a direct loss. The objection to a percentage on the receipt of moneys is one which cannot well be raised by persons in the position of the petitioners, a banker and a bill broker, as it is the daily practice in the city to remunerate functionaries in that way, such as sheriffs, as already instanced by the court, brokers, receivers, and others. The court will act in the same way as was done in *Ex parte Tiplady, in re Dickenson*, 3 Dea. & C. 570, where, although it was held that the Court of Review had jurisdiction to entertain a petition against the allowance made by the commissioner to an official assignee, still it declined to interfere with the decision of the commissioner, unless it was shown that he had, as to the *quantum* of the allowance, proceeded on an erroneous principle.

*Swanston*, in reply. The ground on which the petition is presented is clearly valid, and may be inferred to be so from the arguments used against it. All that can be urged is, that persons in the position of life of the petitioners ought not to contest the allowance, and that there is a general scale of allowance made by many of the London commissioners without regard to the amount of the estate or the quantity of labor bestowed, or extent of services rendered by the official assignees. That is the mode of proceeding which is complained of in this petition.

Knight Bruce, L. J. The question reserved by us for our consideration in this case is, as to the amount of remuneration, under the 44th section of the Bankrupt Law Consolidation Act, 1849, which the commissioner has allowed and directed to be paid to the official assignee. The amount of 367*l.* was, we understand, thus allowed and deducted as remuneration for services and labor done to the 30th of January last, there having been no labor or service since that time, the adjudication having taken place in the November preceding. We understand the sum in question to have been calculated upon the basis of a general rule, or general scale, approved and adopted by some of the London commissioners (but which general rule, or general scale, has never received the sanction of the Lord Chancellor or the Lords Commissioners of the Great Seal), and not on the circumstances of this particular case. The probability is, that it would be consistent with a view, — not to save trouble or time, — but, to the

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*Ex parte Curties; In re Curties.*

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general interests of justice, that there should be a general rule, liable in particular cases to variation, in the exercise of careful judicial discretion; and that there should be an attempt to obtain uniformity of practice, so far as due attention to the language of the act of parliament will permit; nor do we doubt that it would be as well were the London commissioners to apply to the Lord Chancellor under this section. Here we ought not, as we think, to recognize any general rule. Regarding the particular circumstances of this case, although impressed with the belief that official assignees ought not to be remunerated in a niggardly or parsimonious manner, we think, with unfeigned deference to the learned and excellent commissioner before whom this case was considered, but whose attention seems not to have been directed minutely to this particular circumstance, that the amount of remuneration allowed is too high, considered merely down to the period of last January. We think the case must go back to the learned commissioner, unless the petitioners and the official assignee join in requesting us to fix what the amount of remuneration ought to be, which, upon being so requested, we are prepared and ready to do.

*Swanston*, on behalf of the petitioners, requested the judgment of the court fixing the amount of remuneration.

*Russell*, for the official assignee, abstained from any remark.

Their lordships thereupon referred the matter back to the commissioner on this point.

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*Ex parte CURTIES; In re CURTIES.*<sup>1</sup>

July 17, 21, and 22, 1852.

*Bankrupt Law Consolidation Act, 1849 — "Conduct as a Trader."*

A bankrupt, who had twice before compounded with his creditors, made false and fraudulent entries in his books, consisting of fictitious accounts in particular names. He stopped payment, being at the time able to pay 12s. in the pound, and soon after offered 11s. in the pound. The commissioner refused him his certificate and all protection, excepting for the twenty-one days; and on appeal, the lords justices, acting under the discretion given by the 198th section of the act — "a discretion to be exercised on judicial grounds with reference to the nature of the case in general, and on its peculiar circumstances" — dismissed the petition of appeal, with costs, affirming the decision of the commissioner, and refusing any protection whatever, the conduct of the bankrupt being unfair, untradesman-like and disreputable.

A PETITION of appeal was presented in this matter by the bankrupt, Thomas Stephen Curties, of York street, Westminster, whole-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 53.



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*Ex parte Curties; In re Curties.*

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sale cheesemonger, praying the reversal of the decision of Mr. Commissioner Evans, by which any certificate had been refused him, and protection only granted for twenty-one days. The peculiar features of the case will be collected from the narrative judgment of the lord chief justice, and it will only be necessary, therefore, to state that the grounds of the commissioner were first, that the bankrupt had made false and fraudulent entries in his books, with intent to defraud his creditors within the meaning of the 201st section of the Bankrupt Law Consolidation Act; secondly, a fraudulent contracting of debts within the meaning of the 256th section of the same statute; and, thirdly, that after adjudication he had withheld the production of books and papers relating to his trade dealings and estate.

*Swanston* and *Roxburgh* supported the petition of appeal, and stated to the court that 10s. in the pound had been paid, besides the costs of the bankruptcy, up to the time of the dividend meeting; and that the official manager had in hand 263*l.* to answer future costs, and to make a further dividend of probably not less than 2*s.* in the pound.

*Malins* and *Bagley* opposed the petition on behalf of the trade assignees, and urged upon the court the necessity of dismissing the petition, with costs.

*Bury* appeared for the official assignee, also in opposition to the appeal.

*Swanston* was heard in reply.

KNIGHT BRUCE, L. J. This is a case of certificate arising necessarily on one or more of the sections of the act consolidating the law of bankruptcy, of which, without entering into the 201st and 256th sections, it will be sufficient to refer to the 198th section, which directs that the court, "having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader, before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." The discretion here reposed in the court is, as Mr. *Swanston* truly says, not an unlimited discretion; it is to be discreetly exercised on judicial grounds, with reference to the particular nature of the case in general, and also on its particular circumstances; but, before all, is to have regard, if not to be restricted to the conduct of the bankrupt as a trader, and as a trader before as well as after his bankruptcy. The question before us is, whether, having regard to the conduct of the bankrupt as a trader, before as well as after his bankruptcy, it is or is it not fit that he should receive a passport (so to speak) in the

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world of commerce to recommence operations as a trader before paying in full the debts now due from him.

The conduct of the bankrupt has been impeached on several grounds; first, that suspending his payments, intending a stoppage and a composition with his creditors on the morning of the 27th of October, he had, on the preceding Saturday, purchased goods of tradesmen for which he did not pay, and has never paid, and it is contended that his purchase of goods on the Saturday, followed by the almost immediate stoppage in the forenoon of the Monday, was conduct unfair, untradesmanlike and disreputable. *Prima facie* it was so; and it lies on the bankrupt to explain such a state of things; and it has been said on his behalf, that it was not unfair, untradesmanlike, nor dishonest, under the circumstances in which he was placed, to buy goods, and, within less than twenty-four hours, in one sense, and forty-eight hours in every sense, to proceed to effect a composition. He says he intended nothing of the kind attributed to him; that he bought the goods in the ordinary course of business, and that he intended to continue his trade; but that on the Monday morning, so early as nine o'clock, he received an invoice of one parcel of the goods from one of the tradesmen thus used, by the deduction of discount on which it was shown that he expected immediate payment of the amount. The invoice appears not to have been accompanied by a letter; but the bankrupt inferred, as he says, that no further supplies were to be expected from that quarter, without immediate payment. In this instance, there was no demand or pressure either for that or a much larger sum due from him to the same creditor. The amount of this invoice was under 28*l.*, but he says it had such an effect upon him, as showing an intention of no longer dealing with him on credit, but to make their dealings together ready money dealings, he being so short of supplies, his trade so much depending on this man, that the receipt of the invoice induced him to determine at once to come to a stoppage. Now, certainly, this is a most extraordinary state of circumstances, and one which, although not absolutely impossible, yet is so improbable that it requires a very great stretch of credulity to believe. It is curious, too, that in his position he should have at all desired to have stopped payment, or compounded with his creditors, for it is plain he had the means of paying 12*s.* in the pound; indeed, he shortly afterwards offered to pay 11*s.* in the pound. The whole affair, therefore, wears a most mysterious aspect, as to which it is impossible to account to the mind, before we resort to the early history of this man.

It appears that in December, 1831, being then a linen-draper, or recently an apprentice to a linen-draper, at Worthing, and just out of his time, he married a lady of some fortune, in his own rank of life. The fortune she had appears to have been short of 1,000*l.*, about 800*l.* — a very good fortune for his rank of life. Of this sum 500*l.* was settled strictly, and is not now in question. There was no other settlement, and the fortune came into the possession of the husband; but he says, though there was a formal deed as to the 500*l.*, there was an understanding (or an agreement of some kind) that he was to be

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*Ex parte Curties; In re Curties.*

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a debtor for the rest of the fortune, and whether that is to be believed depends on the circumstances taken together. He appears on this occasion, with the aid of his wife's fortune, to have changed his line of business, and to have taken to the bacon and cheese trade, in which he was not long outwardly prosperous, for in 1836 he stopped payment, and paid 10s. in the pound. That was the conclusion of the first cycle of his business. Afterwards, he went on for some years without entering into any composition. But in 1847 he came to a second composition, and in that he paid 9s. in the pound. The ensuing period of trade is not so long, because the time for the third composition appears to have arrived in 1851. Looking back to these circumstances, to which others may be added, some light dawns upon the otherwise mysterious circumstances in which a man, such as he was, with regard to property, should desire to stop business and compound with his creditors. I have endeavored to account satisfactorily to my own mind for his conduct with respect to this third transaction, and I have failed in the attempt; and I regret to say that I am unable to give credit to the reasons he assigns for his stoppage, — for his last act, the attempt at composition. I am unable to assign it to any motive consistent with credit to him.

This is not all. He did not at this stage contemplate bankruptcy, he intended a composition; but against his will, his creditors not wishing to accept 11s. in the pound, he was made a bankrupt, and his books and documents have undergone an adverse inspection. From the ledger he seems to have abstracted four pages, or two leaves; these, he says, were taken out by himself. The knife, also, has been in use in more than one place in the books, and must be taken to have been so used by himself; but what makes the matter the subject of graver consideration is, that the abstracted leaves and the erasures are all accompanied by suspicious accounts in the same books, and to which I must now refer. The book contains, at least, four fictitious accounts, that is, they are accounts ascribed to persons with whom he had no dealing. The allegation, however, on his part is, that the transaction was fair, and this form of account was merely adopted because he did not wish his clerks and servants to know to what they really related. One of the accounts is ascribable to a man of the name of Payne, making Payne a creditor to the extent of 200*l*. That is admitted to be fictitious in every sense, but the bankrupt explains it thus: "I say that previously to the 10th of January, 1848, I had saved 200*l*. from the sale of bacon wrappers, empty hogsheds, and preferences on compositions with my creditors, which I had kept apart from my business as a private fund; but then, wanting the amount in my business, I entered the same in my books under the head of John Payne." The phrase "preferences on compositions," is one of which I never before heard. Of the other three accounts, one is a closed account, entered in the name of Maria Curties, the mother of the bankrupt. Of the other two, being open accounts, one is with Mr. Webberley, the brother in law of the bankrupt, the other with Mr. Pointon, his cousin; they are all of them fictitious in point of names, but then he says they were honest accounts, merely

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*Ex parte Curties; In re Curties.*

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intended for the purpose of concealment from his clerks; and he says the money all belonged to his wife. There is no pretence for saying that it belonged to his wife for her separate use; but it is said by Mr. Swanston, and said truly, that the bankrupt and his wife might so have treated the money, and this would remove any dishonest intention. I have stated the settlement on the marriage of the 500*l.*; I have stated the closed accounts with Maria Curties. The two accounts with Webberley and Payne amount to 1,100*l.* Now, that certainly is a great amount of accumulation on 300*l.*, the remainder of her fortune not in settlement. This is accounted for by the interest on the 500*l.* and on other money accrued due in her right, and by her saving from the expenses of the household, which appears to have been conducted with economy. It is, however, impossible that all this should be presented to the mind of any reasonable being without exciting an exclamation of surprise. I agree that the improbable is not always the untrue; and I agree that innocent men have been convicted on circumstantial evidence, apparently most satisfactory, but which has afterwards turned out to be untrue. Those, however, who have to determine on questions of doubtful facts, must do their best to come to a conclusion, and must not avoid doing so merely on the ground of that liability to error which is incident to all. In viewing the matter in that way, I am obliged to say I cannot come to the conclusion that the history of this account is credible. I do not believe it.

The matter does not rest here, for this tradesman employed an accountant, Mr. Glover. In the course of the communications which passed between Mr. Glover and himself, it appears that these accounts struck Mr. Glover as seeming remarkable, but it does not appear that the bankrupt then explained to him that these accounts, as to Webberley and Payne, were accounts relating to property of his wife; but he led Mr. Glover to believe that they were true and honest accounts with persons described. The matter does not even thus end. There appears in the account, under the name of Webberley, on the 27th of October, 1851, a check debited to Webberley, in part payment of the apparent debt due to him. This struck the accountant as being on the day of the stoppage of payment, and he remonstrated. The bankrupt, however, at first insisted on its propriety, and that it ought to stand, but at last he gave way, and withdrew it. Though there are other circumstances to which I might allude, I lay no stress on them.

I find the facts already mentioned before me, and I am asked, in the exercise of a judicial discretion, and on a tribunal having to a certain extent, to arrange the affairs of commerce—I am asked to give the passport of the tribunal to this man to enable him to enter again into trade. I am surprised that such an application should have been made with the sanction of any disinterested adviser. It is a demand without pretext; it is a demand without color, and I do not recollect a case where a certificate has been asked, in which there were such plain, palpable, and irresistible grounds for refusal. For my part, and so far as I am concerned, I dismiss the petition; I refuse the petitioner his certificate, and I also refuse him any protection whatever.

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*Ex parte Staner; In re Staner.*

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LORD CRANWORTH, L. J. I entirely concur in the conclusion at which my learned brother has arrived. The case has been by us most fully and carefully considered; and there never was one more fit for refusal. It is a mistake to suppose that the question before the court is, whether or not sufficient punishment has been inflicted; but the question is, whether, under the circumstances of such dishonesty as are here charged, and where the explanation given is so entirely and utterly incredible, the court ought to sanction the re-entry of the bankrupt into business, without his having previously paid his debts in full. I think most clearly not; and the petition must be dismissed, and with costs, and all protection be refused.

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*Ex parte STANER; In re STANER.*<sup>1</sup>

July 24, 1852.

*Bankrupt Law Consolidation Act, 1849 — "Conduct as a Trader" —  
Fraud — Falsehood — Certificate.*

A trader carried on business as a baker, and, before the statute 12 & 13 Vict. c. 106 came into operation, obtained money from J. on pretence that it should be invested on mortgage, which was not done. He also obtained money from F. on a similar pretence, which was not so invested. The trader became bankrupt, and the commissioner refused him any certificate; and, on appeal, held (dismissing the appeal), that the money of J. and the money of F. were obtained by fraud and falsehood; that on these grounds he was not entitled to his certificate; that before a bankrupt can ask for his certificate, he should have conformed to the bankrupt law since his bankruptcy; that if a trader so obtains money, though not in the course of his trade, or in matters connected with his business, it is, on a question of certificate, conduct as a trader, within the meaning of the act; and that if a case comes otherwise within the act, it is not the less so because the conduct complained of took place before the passing of the act.

THIS was an appeal by the bankrupt, George Staner, a baker, at Margate, against the decision of Mr. Commissioner Holroyd, who refused him either certificate or protection, on the grounds of fraudulent contracting of debts, and of conduct as a trader within the 256th section of the statute, 12 & 13 Vict. c. 106. From the evidence before the commissioner, it appeared that the bankrupt, although a baker, was in the habit of borrowing money, and laying it out on mortgage and other securities. His assets amounted to sufficient to pay 10s. in the pound, and his unsecured debts were 7,600*l.*, or thereabouts. At the certificate hearing, before the commissioner, Mr. Jay and Mrs. Fife severally opposed him, each on the ground that he had obtained money by false and fraudulent pretences. Mr. Jay alleged that the bankrupt obtained 450*l.* from him, on pretence that it was to be laid out on mortgage, while the bankrupt swore that it was lent to him on his own personal security. The matter turned on a cor-

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 56; 16 Jur. 1124.

*Ex parte Staner; In re Staner.*

respondence, one of the most material letters of which was, however, alleged to be lost. The particulars of this correspondence are, as to their material points, fully stated in the judgment of Lord Cranworth. At the present hearing, Mr. Jay, the creditor, and the bankrupt were examined *vivâ voce*, and each adhered to his version of the affair. Mrs. Fife, in her examination before the commissioner, swore that she and her late husband were acquainted with Staner, and that after her husband's death he asked her how she was left off, and that she told him she had 200*l.*, which was too much to be in the house, whereupon he offered to lay it out on mortgage. The particulars of this evidence, which on the present occasion was repeated, in an affidavit of Mrs. Fife, she being too ill to attend personally, are fully stated in Lord Cranworth's judgment. Miss Fife, the daughter of this creditor, was examined *vivâ voce*, upon the subject of the loan, and so was the bankrupt; and, as in the case of Mr. Jay, the evidence was not only contradictory, but was in every respect diametrically opposed. The bankrupt swore that he did not recollect the transaction as detailed by Miss Fife, and as set out in her mother's affidavit; and then he said the story was untrue, and that the money was lent on his promissory note only. Before Mrs. Fife's affidavit was admitted, the lord chief justice stated that, in his opinion, it was due to the bankrupt that the case should stand over for the personal attendance of that lady, if the bankrupt desired it. The bankrupt, however, did not avail himself of the offer, and the case was heard on the affidavit of Mrs. Fife, and on the oral testimony of her daughter, and on the *vivâ voce* examination of the bankrupt.

Cooke, in support of the appeal. This case divides itself into three parts: first, is it or is it not, upon a fair estimate of the evidence before the court, made out that the bankrupt did, in each of these two cases, as he unquestionably has done for a long time in other matters, receive the moneys of these opposing creditors upon his own personal security, and to be laid out by him in such securities as he might from time to time see fit, the creditors relying on his personal security, and not on any investments he might make? Secondly, whether, however the money was obtained, and for whatever purpose lent to him, or intrusted to his care, can it be said that whatever his conduct in the affair might be, it was "conduct as a trader" within the meaning of the bankrupt law, his trade being that of a baker, and the money being in no way whatever placed in his hands in the conduct or for the purposes of his business? And, thirdly, if neither of those points can be answered favorably to the bankrupt, can the court properly hold the case to come within the new bankrupt law, seeing that the two transactions took place before that law came into operation? Upon the first point, the fair estimate to be derived from the opposing testimony is, that the money was lent to him, and was not intrusted to him for the purpose of being invested on mortgages for the creditors. This, too, was done at periods when the bankrupt believed he was solvent, and when, in fact, he was so, and he would have so remained but for unforeseen and unavoidable mischance.

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*Ex parte Staner; In re Staner.*

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As to the second question, how can it be said to be "conduct as a trader" within the meaning of the Bankrupt Consolidation Act, for a baker to obtain money, however fraudulently, if fraud there be, which is not obtained in his character as such trader, and not to be applied or used in his trade? To hold that it were, would be a contradiction. If the legislature meant the words to apply to the general conduct of the bankrupt, the act would have spoken merely of his conduct, but by adding the words "as a trader," the legislature manifestly intended "conduct of the bankrupt in his character of a trader," or "in the conduct and management of his trade." There are two cases, decided by one of your lordships, on the construction of this expression, and both cases are very distinguishable from this. They are *Ex parte Wakefield*, 17 Law Times, 55; s. c. 7 Eng. Rep. 302; and *Ex parte Dornford*, 20 Law J. Rep. (N. S.) Bank. 7; s. c. 5 Eng. Rep. 242. In these cases, although the transactions complained of were not strictly in or relating to the business of the parties (and they are not at all so here), yet, in the latter case, the bankrupt obtained the money, though by misrepresentation, yet still to the knowledge of the lender, for the purposes of his trade, while in the former, the breaches of trust were held not to be committed by the bankrupt as a trader, and he was left open to all the consequences of them in this character of breaches of trust. There is nothing in the judgments to show that the court would have come to the conclusion it did if the facts had been there as they are here. Indeed, I infer quite the contrary from those two judgments. Finally, upon the third point, even if the case set up by Mr. Jay and Mrs. Fife be true, or what is the same, if their statements are believed, and the bankrupt be disbelieved; still, what the bankrupt has done was done before the statute came into operation, and, therefore, cannot possibly be said to come within the meaning of the 256th section of that act. For all these reasons, the bankrupt ought not to be deprived of his certificate, and the decision of the learned commissioner should be reversed.

*Bacon* and *Bayley*, for the opposing creditors, were not called upon.

*J. T. Wood* appeared for both the official and creditors' assignees.

LORD CRANWORTH, L. J. This is another of those distressing cases with which we have to deal. It is an application by a party against the decision of the commissioner for a certificate, which he thought it his duty to refuse. It is an extremely painful duty to have to perform, sitting in a civil matter, to adjudicate whether a punishment (for such in effect it is,) is or is not to be inflicted. I confess I think the commissioner is right in refusing the certificate, on several grounds. In the first place, before the bankrupt can ask for a certificate, he should have conformed to the bankrupt law since his bankruptcy; he should have stated the truth and the whole truth respecting his estate, and I do not shrink from saying that here he has not done so. I do not believe the statements he has made.

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*Ex parte Staner; In re Staner.*

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There were two transactions relative to loans brought in question. The first was that of Mr. Jay. Now, if the question was, whether Mr. Jay could be considered as in any other light than a simple contract creditor, there might be doubt, because his subsequent conduct led to the conclusion that the 450*l.* advanced by Jay should be in the hands of Staner, to be as well secured as he could, on his (the bankrupt's) houses. That is not now the question; the real point is, what was the original transaction? Mr. Jay says, that he advanced his money to Staner, originally, on an undertaking that it should be invested on security; he says, that in a letter, which is now lost, Staner told him that it was to be invested on a mortgage of an estate of a Mr. Petley, but after many inquiries made by him, and many excuses made by Staner, the latter called on Mr. Jay, and told him the mortgage was at length completed, but he added that it was taken for 900*l.* or more, and that as he (the bankrupt) had advanced the greater proportion of the money, he would retain the mortgage in his own hands, and give Mr. Jay a security on his own property, and to this Mr. Jay acceded. As I have already stated, it is immaterial to consider whether that did or did not absolve the bankrupt from the former engagement. But the purpose for which I wish to consider it is this: what was the true transaction? If what the bankrupt has stated to be the true transaction is not so, then he has been deliberately stating what he knew to be untrue. Mr. Jay says it was a contract for a mortgage from Mr. Petley. The bankrupt says it was a loan to him on his promissory note. Looking at the documents, which statement do they bear out? The transaction opens by a letter in May, in which Staner tells Jay as to the state of the funds, recommending him to sell out, and adds: "Now, if you get this letter soon enough to have time to answer me to-night, do it in the following way; are you desirous to sell out if I can get you 5*l.* per cent. upon my own security? For what I expect it may be wanted for, is equal to that. Next, the amount; what would be convenient to invest? Your answer will be waited for by me, because if I can do this service I shall be very pleased, and do not always have the opportunity." Can any one understand that, otherwise than that he was proposing some security other than his own? Mr. Jay agrees to sell out, and letters pass as to the mode of transmitting the money by a registered letter, to which Mr. Jay objects, and then the bankrupt writes to him: "I take it for granted you will have the money on Friday. The security, you may rest assured, is of the most desirable character, or you should not have the investment. Leave that to me." Now, these are terms utterly irreconcilable with the notion that he was borrowing money on his own security. I come to the conclusion that Jay is a person to be believed, and that the bankrupt is to be disbelieved. One circumstance is important for the bankrupt, that it does not appear in writing that the name of the mortgagor was mentioned. Jay, however, says, it was mentioned in the lost letter; that was fairly a matter for observation, but I do not attach much importance to it, because what passed between those parties was by word of mouth, and a person



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*Ex parte Staner; In re Staner.*

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desirous of manufacturing a story which is untrue, would more probably have put it on what passed by word of mouth, instead of referring it to a lost letter. I am, therefore, inclined to regard the circumstance as favorable, rather than otherwise, to the truth of the statement made by Jay. If the case relied on the evidence of Jay alone, I should have come to the conclusion that the bankrupt had wilfully intended to deceive his assignees and the parties interested in his estate, and had not conformed to the bankrupt laws.

The case does not rest here; there is another transaction; and if anything is to be gained by the maxim "*noscitur à sociis*," it is by its application to the present case. This transaction, of a similar character to the former, took place between the bankrupt and Mrs. Fife; and in this instance also we have had the advantage of seeing the demeanor and hearing the statement of Miss Fife and the bankrupt, and we have had the affidavit of her mother, Mrs. Fife, who cannot be examined here orally, on account of her illness; and the bankrupt, who knows the evidence she gave before the commissioner, and is probably aware that her cross-examination would not be favorable to him, did not wish that the matter should be delayed on that account. Now, what is the account given by the mother, in her affidavit, and in a very straightforward manner by the young woman here to-day? Mrs. Fife lost her husband in 1849, leaving a little money, about 200*l.*, in the house. Staner knew them at Margate, and took, or professed to take, some interest in him and his family, and the widow and the daughter supposed him to be their only friend. He tendered his advice to them, and appointed to meet them at the London terminus of the Blackwall Railway, by the hour, he said, of ten o'clock, on a certain day. The daughter says, and the mother states in her affidavit, that they went, and Staner asked them how they were left off, and was told that she had 200*l.*, and that was more money than she liked to have in the house. He said that it was unlucky he had not known it sooner, as he could have got it invested; that a Mr. Powell, of Quex-park, was just dead, that the Cottons were, therefore, in want of money, and that he could have got 5*l.* per cent. He then asked them how long it would take them to get the money, as perhaps it was not too late. He then promised to wait while they went for the money, and in the meantime to see if he could manage the matter. They went and got the money, and on their returning with it, he said he had seen the party, and was happy to say it was not too late, and that he could put the money to work directly. Then, relying upon him and his friendship, they put their all into his hands; he took it, and went away. The bankrupt denies all this, and that there was to be any security, except his own personal security. It is utterly incredible that the story told by the daughter of Mrs. Fife can be an invention; and it is strangely corroborated by the mode in which the bankrupt himself has answered the questions put to him regarding it. At first, he said, he did not recollect it; why he must have recollected it if it had occurred, and if it had been untrue, he would at once have contradicted it. When pressed with further questions, he seemed to feel his position, and

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*Ex parte Staner; In re Staner.*

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then he denied the story to be true. A man may well say, "I do not recollect whether it rained this day fortnight," but he could not be heard to say, with any hope of belief, that he did not recollect whether a man gave him a blow, or did any other act of violence on that day. So, if he was speaking the truth, he would not in this transaction have said he did not recollect. We have the duty cast upon us, in this case, of saying whether we disbelieve this young woman, supported as she is by the affidavit of her mother (too ill to be examined), or to pay no attention to the oath of the bankrupt. I have no hesitation in saying that, in my opinion, the bankrupt has told a deliberate and intentional falsehood, and that on that ground alone the certificate has been most properly refused him.

Further, I believe his debts to have been contracted by fraud, and in every way by means such as are not proper in the conduct of a trader. I do not think his application for his certificate is to be for one moment listened to, and I am of opinion that his petition must be dismissed.

KNIGHT BRUCE, L. J. The agreement of Lord Cranworth with the decision of the learned commissioner, would be an affirmation of it, whatever might be my own opinion; therefore, it would be unnecessary in me to state my view of the case, whatever that view may be. I think it right, however, not to abstain from stating what my opinion really is.

First, as to the law. It has been suggested, with great propriety, by Mr. Cooke, the learned and able counsel for the bankrupt, that even if the case set up by the opposing creditors were made out, it does not fall within the 256th section of the Bankrupt Act, 1849, because these particular facts having occurred, these acts having been done by the bankrupt before that statute, they cannot be said to come within its operation. For this no decision was cited; and considering the learning and experience of Mr. Cooke, the learned counsel who supports the bankrupt, I think I may take it that no case exists, and I state my opinion to be, that if this case comes otherwise within the act of parliament, it is not the less so because the conduct complained of took place before the passing of the statute.

Another observation made was, that the debt was not fraudulently contracted by the bankrupt in his trade, and that, therefore, it was not conduct in a trader within the meaning of the Bankrupt Act, and for this my decision in *Wakefield's case* was referred to and relied upon. My impression is different as to the effect of that case, and I think that such conduct would be conduct of a man in trade showing him to be unworthy of that degree of estimation which ought to belong to one engaged in the transactions of commerce, or indeed in any other transactions of life. If in *Wakefield's case* I said anything contrary to this, I was wrong; but I do not think I so said. My impression has always been, and my opinion now is, that if a man in trade deals in the way alluded to, though not in the course of his trade, or in matters connected with his business, it is, for the purpose of such an application as the present, conduct of a

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*Ex parte Bower; In re Bowers.*

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man "as a trader" within the act of parliament. So far as to the law in this case.

There are two acts of the bankrupt impeached. How the matter would have stood if *Jay's case* had been the only one against the bankrupt, I will not give any opinion, because it is not necessary; but I am satisfied on the evidence, so far as any one, subject to infirmity in judging, can be satisfied, on the comparison of a conflict of testimony by adverse witnesses, that the money of Mrs. Fife was obtained from her unfairly, improperly, and fraudulently. A state of things was represented to her and her daughter, who has been examined, which did not exist; they were ignorant (I do not use the term in an offensive sense) and helpless women, whom this tradesman, who professed to be their friend, ought to have assisted, advised, and supported, and if he saw they were about to commit an act of imprudence, he ought to have prevented them; at all events, he ought to have told them the exact truth. He allowed them, however, to part with their money in a mistake, which he might have prevented. I come to the conclusion, then, on the evidence, that the bankrupt contracted a debt with Mrs. Fife by fraud and on false pretences.

Considering that I come to that conclusion, and considering the 256th section of the Bankrupt Act, I am to ask myself, whether a man capable of committing this single act as to these women, is worthy to receive what I have called a passport to enter into trade again without paying his debts. I am of opinion that he is not, and on the ground of his conduct to these helpless women alone, I refuse him his certificate. Let the petition be dismissed, and the costs of the assignees and opposing creditor only come out of the estate.

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*Ex parte BOWER; In re BOWERS.*<sup>1</sup>

May 10, and July 24, 1852.

*Bankrupt Law Consolidation Act, 1849—"Trader Debtor"—Summons—Particulars of Demand.*

A creditor, a wholesale dealer, issued a summons under the 78th section of the act, demanding payment of money due from a retail dealer in the same line of business, and described the items in the particulars of demand as "goods:"—

*Held*, that this described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty.

The situation of parties and nature of demand are to be considered in determining what is convenient certainty.

A doubt on the legal validity of an adjudication is not sufficient ground for annulling it.

THE contest between John Bowers, of Worcester, grocer, and John Bower, of London, fruit-merchant, is detailed in the case of *Ex parte*

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 61; 1 De Gex, M. & G., 468; 16 Jur. 734.

*Ex parte Bower; In re Bowers.*

*Bowers*, 21 Law J. Rep. (n. s.) Bank. 13; s. c. 10 Eng. Rep. 1. John Bowers appeared before the district court at Birmingham, and showed cause against the adjudication on the ground, among other grounds, that the particulars of demand served by John Bower, his creditor, were insufficient within the 78th section of the Bankrupt Act. After two adjournments, the question was gone into by Mr. Commissioner Balguy on the 2d of February, 1852, when John Bowers attended, and upon examination deposed as follows:—"I purchased the goods of the petitioning creditor at two months' credit, and received an invoice, which had at the top of it the words 'cash in two months;' I gave the petitioning creditor a bill, which I had received from a customer, for 29*l.* 17*s.*, and paid the 7*l.* balance, and the two months' credit had not expired when the notice of demand was made upon me." The commissioner annulled the adjudication; but in the memorandum made by him, the reason assigned did not in any way relate to the point of the time of credit not having expired, nor to the question, whether the particulars of demand were sufficient. The particulars of demand were as follows:—"The Bankrupt Law Consolidation Act, 1849. Particulars of demand and notice requiring payment. To John Bowers, of the city of Worcester, in the county of Worcestershire, grocer, dealer, and chapman. The following are the particulars of the demand of the undersigned, John Bower, of No. 8 Botolph Lane, in the city of London, fruit merchant, against you, the said John Bowers, amounting to the sum or 66*l.* 9*s.* 1*d.*

	£	s.	d.
1851.			
April 14.—To goods,	20	10	0
June 9.—Ditto,	17	0	4
October 8.—Ditto,	36	1	9
1852.	73	12	1
October 6.—Cr. by cash,	7	3	0
	£66	9	1

Take notice that I, the said John Bower, hereby require immediate payment of the said sum of 66*l.* 9*s.* 1*d.* Dated this 2d day of December, in the year of our Lord, 1851. (Signed) John Bower, carrying on business at No. 8, Botolph Lane, in the city of London."

The petitioning creditor, John Bower, appealed from the decision of the commissioner annulling the adjudication. The case was argued on several points; but this report is confined to that arising on the sufficiency of the particulars of demand.

*W. P. Wood* and *Baggallay* opened the appeal; but the court called upon

*Swanston*, who appeared for the trader debtor. The whole of this adjudication is invalid, and, among other reasons, because of the defective condition of the particulars of demand. The rule of the court is, that the particulars of demand must be reasonably certain in order to enable the debtor, or alleged debtor, to ascertain the na-

*Ex parte Bower; In re Bowers.*

ture of the items, and, therefore, whether he is indebted at all. This was so held in *Ex parte Greenstock*, 15 Law J. Rep. (N. S.) Bank. 5; s. c. 1 De Gex, 233, from which case it is plain that the alleged debtor has a right to have this reasonable certainty in the particulars of demand, so that he may see the nature of the items, and that if any means exist of producing evidence to show such items, or any of them, to be wrong, the alleged debtor may have an opportunity of producing it.

[KNIGHT BRUCE, L. J. I do not hear it said that the bankrupt in this case was misled by the particulars of demand. Does he swear that he was?]

[LORD CRANWORTH, L. J. Particulars of demand in one case, and between one man and another, would be good and sufficient, which between one of those men and a third would be otherwise. Suppose the case of a debtor and creditor, one set of particulars would be enough, while between the executors of the debtor and the creditor it would not. Can any general rule be laid down applicable to every case? I think not. Convenient certainty must be construed with reference to the information which the person, to whom the particulars are sent, already has.]

The bankrupt, it must be admitted, has made no such affidavits, nor is it in any manner shown that he was actually misled, but still it is to be observed, that in the particulars there is no degree of certainty whatever. There is, to be sure, a vague and general description, and under it any demand might be set up against the debtor, and he would have no opportunity of defending himself, while the rules and practice of the court require a reasonable and convenient certainty as to dates.

KNIGHT BRUCE, L. J. Reference having been made during the argument to the case of *Ex parte Greenstock*, it may not be out of place to observe, that whether all the reasons given for the judgment in that case are sustainable or not, the conclusion appears to have been correct, namely, that it would have been better that there should not have been an adjudication upon the materials which then existed. The amount of the demand was 132*l.* 15*s.* 2*d.* Now, it was requisite, with reference to what had been sworn upon the affidavit, that the whole of this should appear to be for goods sold and delivered. But upon the amount set out in the particulars of demand, as much as 122*l.* 9*s.* 6*d.* of the total amount was due for bills returned, and interest upon those bills, which (however the truth might have been) were not shown upon the particulars of demand to have been given for goods sold and delivered. Therefore, out of 132*l.* 15*s.* 2*d.* the particulars were, as to so large a portion as 122*l.* 9*s.* 6*d.*, plainly defective with reference to the affidavit. With regard to the small remaining portion of the debt, being 10*l.* 5*s.* 8*d.* only, it was doubtful whether the dates were sufficiently set forth. I agree that the date, 1845, was set at the head of the particulars; but when the separate items were looked at, if all of them belonged to the year 1845, they were not chronologically arranged, and this gave rise to a doubt as to what

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*Ex parte Bower; In re Bowers.*

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debts were meant. There were items in September and October, and then one in August. Now, I was not persuaded that it was a necessary inference from an account so prepared, that the month of August, 1845, so placed below and separate from September and October, was the month meant. If that were so, the adjudication would on that ground have been insufficiently supported. But if it could have been legally supported, still this jurisdiction is not bound to suffer every adjudication which may be legally valid to remain; and I am of opinion that the court there rightly exercised its jurisdiction, in declining to give effect to the proceeding relied upon as the foundation of an act of bankruptcy. All the reasons there assigned for the decision may possibly not be sustainable; upon that point I give no opinion. But I adhere to the conclusion.

In the present case, several objections have been made to the proceedings relied upon as the foundation of an act of bankruptcy. The most serious objection appears to me that founded on the form of the particulars of demand, which is a point on which the decision of the commissioner did not proceed, or is not expressed to proceed. It appears to me that a set of particulars of demand sent out by a trader to one individual may be sufficient, which would have been insufficient if sent to another, although the demands were the same. The question in each case must be, whether the particulars communicate a reasonably sufficient degree of information to the alleged debtor as to the demand. Now, in *Ex parte Greenstock*, the information may or may not have been sufficient. But in this case, considering what goods have been furnished,—considering the station in life of the alleged debtor and creditor, and the words of the particulars of demand, my impression is that they were sufficient in the particular circumstances of this case. And I am of opinion that the particulars are not vitiated legally because they contained one claim which is not sustainable, either because the debt claimed is not due at all, or because it is not actually due at the time of the demand, whatever effect such an error ought to have in the exercise of the discretion of the court upon an application not made *ex debito justitiæ*. So much for the legal points in the case, on which the inclination of my opinion is against the objection made to the adjudication.

The commissioner, however, was here executing a jurisdiction given by the 104th section of the recent act of parliament. Now, suppose this case to arise (which occurred frequently in former states of the bankrupt law), that the validity of the bankruptcy being in question before a court having jurisdiction to annul it, the legal validity being doubtful, in such a case under the former law, the court having this jurisdiction was more in the habit of annulling,—unless there were some circumstances to induce the court so to exercise its discretion beyond the legal doubt. If there were no such circumstance, the legal doubt was not sufficient ground for annulling,—for this reason, that the mischief arising from the continuance of the bankruptcy, if unsupported by legal requisites, was remediable, whereas that arising from annulling the proceedings, if it was valid, was irremediable. Now, I consider that the court is, at least, in the position which I

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*Ex parte Nicholas; In re The Monmouthshire and Glamorganshire Banking Co.*

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have described, in the present case. There is an arguable objection against the validity of the adjudication in point of law; but I am not only not satisfied that the objection is sustainable, but the inclination of my opinion is against its sufficiency. Therefore, as I apprehend, it is not the duty of this court to annul the adjudication; but the proper course is to leave the bankrupt to question the adjudication as he may think fit, giving him every facility to proceed at law for that purpose. Here every consideration, as to the consequences of annulling the bankruptcy, seems to be against taking that step. The result is that, in my opinion, so far as this objection is concerned, the adjudication must stand unreversed.

LORD CRANWORTH, L. J., was of the same opinion, and the appeal was dismissed.

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*Ex parte NICHOLAS; In re THE MONMOUTHSHIRE AND GLAMORGANSHIRE BANKING COMPANY.*<sup>1</sup>

July 29, 1852.

*Joint-Stock Companies Winding-up Act, 1849 — Proof — Separate Creditors — Official Manager.*

A. B. was a shareholder in a joint-stock banking company, which stopped payment. He became bankrupt, and afterwards, before he obtained his certificate, an order for the winding up the affairs of the banking company was obtained, and, subsequently, he obtained his certificate. The commissioner in bankruptcy declined to permit the official manager to prove for the amount of calls on the bankrupt's shares; but the court held that, under the 14th and 30th sections of the Winding-up Act of 1849, the official manager was entitled to go in, and prove for the amount of calls in competition with his separate creditors.

THIS case came before the Court of Review in a twofold character, — one as being under the bankruptcy; and the other, under the winding-up order, made in the matter of the above-mentioned company. The facts were shortly these; and they were confined to the question under the bankruptcy.

Mr. Jacob Jenkins Nicholas, of Newport, Monmouthshire, was a shareholder in the Monmouthshire and Glamorganshire Bank, in which he was the holder of fifty shares. The bank stopped payment on the 6th of October, 1851; and on the 6th of November, Mr. Nicholas was adjudged a bankrupt, on a petition of adjudication presented against him. On the 12th of January, 1852, an order was made under the Joint-Stock Companies Winding-up Acts, for winding up the affairs of the company. On the 7th February following, the bankrupt obtained his certificate; and on the same day, a dividend of 10s. 6d. in the pound was declared on his estate. His name was excluded from the list of contributories — on the authority, it was said, of

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<sup>1</sup> 21 Law J. Rep. (N. S.) Bank. 64.

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*Ex parte Nicholas; In re The Monmouthshire and Glamorganshire Banking Co.*

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the case of *Ex parte Chappell*, 19 Law Times, p. 29 — on the settling of the list; but, subsequently, and on the 27th of April, a call was made of 60*l.* on each contributory of the company, and among them on the bankrupt, “in respect of fifty shares, with the qualification of a certificated bankrupt not personally liable, but included in the list for the purpose of being represented by his assignees, and for the purpose of enabling the official manager to tender proof of calls in the matter of his bankruptcy in respect of fifty shares.” The Master then ordered that the official manager should attend any meeting in the matter of the bankruptcy, to prove, or tender a proof against the estate of the bankrupt, “for the balance, if any, which shall be found due from the said Jacob Jenkins Nicholas, after debiting his account in the company’s books with such call upon the said fifty shares.” The official manager, in obedience to this order, tendered a proof for 3,000*l.*; but the commissioner declined to admit the proof, without the sanction of the court.

*Bethell* and *W. M. James*, for the official manager, in support of the right to prove, cited the cases of *Steward v. Greaves*, 10 Mee. & W. 711; s. c. 12 Law J. Rep. (N. S.) Exch. 109, and *Davison v. Farmer*, 20 Law J. Rep. (N. S.) Exch. 177; s. c. 4 Eng. Rep. 391.

*Roundell Palmer* and *Karslake*, for the assignees.

KNIGHT BRUCE, L. J. These applications, the one in the bankruptcy of Mr. Jacob Jenkins Nicholas, and the other under a winding-up order that applies to a joint-stock company, of which Mr. Nicholas was a shareholder, raise substantially this only question, — whether, by the effect of the acts of parliament, called the “Winding-up Acts,” the general separate creditors of a bankrupt, who happens to hold shares in a joint-stock company, which is made liable to the operation of these acts, are placed in a different position from separate creditors of any other person engaged in a mercantile partnership. The question is, not whether there ought to be an alteration, nor whether there are grounds or reasons for making it, but whether the legislature has said it shall be so, in language not to be mistaken. Now, the case stands thus: Mr. Nicholas was unfortunately a shareholder in one, I believe, of the most wretched of the joint-stock companies, in its results, which stopped payment on the 6th of October, 1851. At the time of the stoppage, Mr. Nicholas had not become a bankrupt; he became a bankrupt afterwards, and, after that event, but before his certificate, a winding-up order was made, and, after the winding-up order was made, his certificate was obtained; it is now contended by or on behalf of the official manager of the company, that a call made in respect of the shares which this bankrupt held before his bankruptcy is to be treated for every purpose as a separate debt of the bankrupt, in the administration of his estate, — a startling proposition, certainly, to any person who has not his attention called to the details of these acts of parliament.

It is clear that, independently of these acts of parliament, accord-



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ing to all the ordinary law relating to bankruptcy, proof could not be made in competition with the separate creditors. It could not be made on behalf of the partners in the joint-stock company, because all the debts are not paid by the partners; according to the law in ordinary cases it could not be done. If, therefore, general separate creditors are to suffer, it is on the ground of a particular law created by these acts. The case seems, to myself and to my learned brother, to turn entirely upon the 14th and 30th sections of the Winding-up Act of 1849. By the 14th section it is enacted, "That if any contributory or alleged contributory be a bankrupt or insolvent, he shall be entitled to attend by his assignees, and in all proceedings against his estate under the said act shall be sufficiently represented by such assignees."

By the 30th section it is enacted, "That where any contributory of the company is a bankrupt or insolvent, it shall be lawful for the official manager to prove in the matter of such bankruptcy or insolvency for any balance ordered by the Master to be proved against the estate of such contributory, and to take and receive dividends in respect of such balance in the matter of the bankruptcy or insolvency as a separate debt due from such bankrupt or insolvent, and ratably with the other separate creditors. Provided always, that if any creditors of the company, not being such petitioning creditor under the fiat as after mentioned, shall have proved or shall prove against the estate of such bankrupt or insolvent contributory, in respect of any debt due from the company, then the dividends received by the official manager from the estate of such bankrupt or insolvent contributory, shall be paid and distributed by the official manager, under the direction of the Master, in the first instance, ratably amongst the creditors of the company so proving against the estate of such bankrupt or insolvent contributory as aforesaid, until the debts due to such creditors respectively be fully paid, and, subject thereto, such dividends shall be applied by the official managers towards the general purposes of the winding up of the affairs of the company: Provided, also, that in case any such fiat shall have been issued on the petition of a joint creditor of the said company in respect of his joint debt, and he shall have proved such joint debt for the purpose of receiving dividends under such fiat, then any dividends paid to such petitioning creditor under such proof, shall be set against the dividends payable to such official manager, in respect of the proof so made by him as aforesaid, so far as the same will extend." It is difficult to surmount these words; but it has been contended that this act does not apply to a case of this description, where the bankruptcy has taken place before the winding-up order. As I have already said, the word "is" cannot be construed literally; it means "shall be," or, "may happen to be." According to the construction offered on the part of the assignees, the word ought to be rather "becomes." The bankruptcy did not relieve this gentleman from his liabilities; he was as liable at the moment of the winding-up order as ever, and so is his estate now. He was liable, because he had no certificate. The estate is liable, because it was liable before bankruptcy. This act

*In re The St. James's Club.*

clearly changes the law of the country as to particular persons under circumstances which I do not understand; but our business is to construe it. I fear the rights of these persons are changed by the legislature. The latter clauses are, perhaps, *locus communis*, and afford an argument each way; but the argument preponderates in favor of the view taken by the official manager. It is true they are not provisions which seem to be well or correctly adapted to any theory or any practice that ever prevailed in the country; but it is very unsafe to rely on such words as contravene language so clear as the provisions of these sections. I feel myself, therefore, obliged to say with regret, that this demand has been directed by the law of the country to come in competition with the separate creditors, so that they are placed in a different position from any other separate creditors.

LORD CRANWORTH, L. J. I concur in arriving at the same result, and with the same degree of regret. Whatever the date of the bankruptcy, there is the same anomaly, if the separate creditors are put on a different footing from that in which they would have stood, if the act had not passed. It is difficult to believe the legislature intended to put them in a different position; but it is our duty to consider the language of the act, which we cannot construe in any other way.

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*In re THE ST. JAMES'S CLUB, AND THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849.*<sup>1</sup>

July 8 and 9, 1852.

*Joint-stock Companies Winding-up Acts—Club not within the Meaning—Liability of Members.*

A club is not a company within the meaning of the Joint-stock Companies Winding-up Acts; and although it is an "association," yet:—

*Held*, that it is not an "association" within the meaning of the 12 & 13 Vict. c. 108, that act pointing at "associations" established for profit.

Ambiguous words occurring in an act of parliament ought not to be extended to institutions which are well known to exist, but are not named in the act.

One of the rules of a club was in these words: "All the concerns of the club, the domestic and other managements, and regulations for its establishment and management, shall be conducted by a committee of sixteen members."

*Semble*, that this did not authorize the committee to raise money by debentures, or otherwise to pledge the credit of members.

*Quære*, to what extent members of a club may bind themselves by being present at a general meeting at which a resolution is passed?

THIS was an appeal from an order of Sir J. L. Knight Bruce, late Vice-Chancellor, whereby he ordered the above association to be dis-

<sup>1</sup> 16 Jur. 1075.

solved, and referred it to the Master to wind up the affairs of the club under the provisions of the Winding-up Acts. The petition upon which the order was made was presented by the managing committee of the club; and from it it appeared that the club had been originally projected in the month of November, 1848, under the title of "The Military and County Service Club;" that a committee of management and a secretary were appointed; and that certain rules and regulations were then issued for the management of the club. It is unnecessary to state these rules in detail, as they were merely for the regulation of the admission and expulsion of members, in the usual mode of west-end clubs. There was no express provision in these rules for the raising of funds other than by the entrance fees and annual subscriptions of members. The powers for the management of the affairs of the club were contained in the 12th rule, which was in these words—"All the concerns of the club, the domestic and other managements, and regulations for its establishment and management, shall be conducted by a committee consisting of sixteen members. The trustees, if not already members, shall be *ex officio* members of the committee." By the 25th rule, all members were required to pay their bills for every expense they should incur in the club before they leave the house. At a meeting of the committee of management, held on the 11th October, 1849, it was resolved, "that to facilitate the operations of the club, the committee of management, in pursuance of the powers accorded to them by rule 12, should issue debentures, on the same principle as that of the other London clubs, at 100*l.* each, bearing 6*l.* per cent. per annum interest;" and the secretary was authorized to make such arrangements as were necessary to carry such object into immediate effect. The club not having been able to raise more than 900*l.* upon such debentures, the committee of management applied to Messrs. Herries & Farquhar, bankers, for the loan of a sum of 5,000*l.*, to which the said Messrs. Herries & Farquhar agreed, on their receiving the joint and several promissory notes of the said committee for the said sum of 5,000*l.*, payable on demand, with interest at 5*l.* per cent. per annum; and the said sum was accordingly advanced upon a joint and several promissory note, signed by twelve of the committee of management. Subsequently, at a general meeting, the loan from Messrs. Herries was approved, and it was proposed and resolved that club debentures, to the extent of not more than 10,000*l.*, should be issued; but it did not appear upon the petition who were present at the meeting. Debentures to the extent of 8,500*l.* were issued by the committee of management. The club did not succeed so well as was expected, between 200 and 300 members only having joined it; the consequence was, that its pecuniary affairs became very embarrassed; and at an adjourned general meeting held on the 12th March, 1851, it was resolved as follows:—"That the club be carried on, and that to meet the liabilities of the club each member shall pay the sum of 60*l.* immediately, or contribute not less than 10*l.* per annum until that amount be paid off; but that any member paying 60*l.*, and wishing to resign, be protected and indemnified from all further liability. That all advances

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made by members beyond the yearly subscription shall be considered as a loan, without interest, to be repaid when the finances of the club will admit. That this resolution be communicated to all members who have at any time made use of the club since its formation, and have subsequently withdrawn, as this withdrawal in no way exonerates them from their share of the general contribution, but it shall be optional to such members to return to the club on payment of the annual subscriptions." It did not appear who were present at this meeting. Very few of the members responded to this resolution by paying the 60*l.* or the 10*l.*, and the club was shortly after closed, the assets being insufficient, by the sum of 16,500*l.* for the payment of the debts and liabilities of the club. An action had been commenced by a creditor of the club against one of the committee of management, and various other actions were threatened. The committee of management presented this petition as contributories of the said club, and prayed that it might be dissolved, and the affairs wound up under the Winding-up Acts of 1848 and 1849. The Vice-Chancellor made the order as prayed. This was an appeal from that order by a member of the club.

*Bacon* and *Burdon*, in support of the appeal, cited *Fleming v. Hector*, 2 M. & W. 172; *Todd v. Emly*, 8 M. & W. 505; and an unreported case of *Lord Mountcashell v. Robertson*; and contended that persons, by becoming members of a club like the present, took upon themselves no liability beyond the payment of their entrance fee and annual subscriptions, and that, therefore, there could be no legal right to contribution as against the members of the club; and that the managing committee had no power to incur debts which could bind the members. But that even, if this were not so, this was not a case which came within the meaning of the Winding-up Acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108; and that it would be doing a violence to those acts to hold that this "association," which was not formed for commercial or trading purposes, or for purposes of profit, and could not be called a business, was within the meaning of those acts.

*Malins* and *Toulmin*, contra, contended that the words of the statute were large enough to include this club under the term "association," which occurs in the last act. That although this association was not exactly established for purposes of profit, yet that it is well known that many persons become members of clubs as a matter of economy, and thereby, if they do not actually make a profit, yet they effect a saving by living at the club, and merely renting a sleeping apartment; and that it was doing no violence to the acts of parliament to hold that an association, which gave to its members personal comforts and other advantages, was as much within the acts of parliament as an association which yielded a dividend to its members. That the acts were passed to include all associations for mutual benefit, and having mutual liabilities, and were not confined to partnerships for purposes of commerce. That if the court had any

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doubt on the abstract question whether a club should be held to be within the acts, still in the present case debts had been incurred by the committee of management upon the authority of a general meeting, and that, therefore, it was a proper case for contribution. They referred to *Richardson v. Hastings*, 7 Beav. 301; 11 Beav. 17.

*Bacon*, in reply.

LORD CHANCELLOR, (Lord St. Leonard's). This is a very important question, but at the same time a very simple point, namely, whether "clubs," in the ordinary acceptation of the term, are or are not within the provisions of the Winding-up Acts. The judge of the court below has held that they are, and sent this case to the Master's office for the purpose of being wound up. This depends upon the acts of parliament, and is a mere question of construction. But before we go to the question of construction, let us consider the nature of this club. It was in no respect different from ordinary clubs, except, perhaps, that it was rather more stringent in its rules as regarded the matters that might be brought forward for discussion at general meetings. These clubs are established upon this principle, that persons must be elected before they can be members; and further, they must pay the entrance fee, and so long as they are members they must pay an annual subscription. Now, the rules of this club in these respects are very stringent, and if a person who is elected a member does not pay his entrance fee within the time allowed, he is not in the club; and if he do, but does not pay his annual fee, he ceases to be a member. There is another rule to this effect, that if his conduct be open to objection, and be considered derogatory to his station in society, he may be dismissed from the club by three fourths of the votes of a general meeting. Now, what are his liabilities? In the first place, it is said that he has an interest, whilst he continues a member, in the general assets of the club, and that if the club be broken up he might sustain a suit in this court for the administration of the assets. It is clear that he has no transferable interest; he has a mere personal right, a permission, to make use of the club whilst he is a member; therefore it is not an interest that can be considered, in the ordinary sense, capital. If the club was dissolved, he would have a right to a share of the assets; he would lose the convenience of the club, but he would get a share of the assets; otherwise he would only have a right of admission to the enjoyment of the club. Now, as regards the liabilities of members, the law on this subject was always settled, but not always administered rightly. At first, the courts of law went wrong, and they held, that all members were liable for goods supplied to the club. That was not the law. Now, it is very clearly settled that no member of a club is liable to creditors of a club, except so far as by contract or dealing he may have made himself personally liable; and that is mere common sense; for if a member, paying his annual subscription, and paying for the articles which he orders in the club, was also liable to pay the persons who supplied the club with those articles, who would belong to a

club? I think, therefore, we have got one step towards the decision of this case, when we have considered the nature of a member's right and interest in the club, and the extent of his liability. Now, to begin with the stat. 7 & 8 Vict. c. 111, we find that that is confined to trading concerns—it only extends to companies formed for the purpose of profit; the words are, “for any commercial or trading purposes.” The act for Ireland, the 8 & 9 Vict. c. 98, is to the same effect; and all the provisions of those acts of parliament will be found to be applicable to trading or commercial companies or corporations only. Then we come to the acts of parliament which have been so much referred to, the 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108. Now, if we stopped at the first of those statutes, there could be no question at all, for it expressly confines its operation to companies within the provisions of the 7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98; for it recites, that whereas it is expedient that those acts should be amended, and that further facilities should be given for the dissolution and winding up of joint-stock companies and other partnerships; and it enacts, “that this act shall apply to all companies, corporate or unincorporate, within the provisions of either of those acts, . . . . and to all companies, associations, and partnerships to be formed after the passing of this act, whereof the capital or the profits is or are divided or to be divided into shares, and such shares transferable without the express consent of all the copartners.” Then sect. 5 gives jurisdiction to this court, and in rather a singular way, “it shall be lawful for any person who shall be or claim to be a contributory of a company” (that, of course, only applies to a trading or commercial company) “to present a petition to the Lord Chancellor or to the Master of the Rolls, in a summary way, for the dissolution and winding up, or for the winding up, of the affairs of such company, in any of the following cases.” The first six of those cases all refer to trading or commercial companies. Then the seventh is in these words: “if any company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up.” This clearly shows that it was intended only to apply to companies that “carried on business.” Then the eighth is in these words—“or if any other matter or thing shall be shown which, in the opinion of the court, shall render it just and equitable that the company should be dissolved.” That is a trading or commercial company to which the act applies. If, therefore, the case stood upon this act, there could be question at all; this was no “business;” there could be no “profit,” in the sense in which that word is used; there might be a benefit, but there could be no “profit” payable to any one. Then we come to the 12 & 13 Vict. c. 108, which introduced the difficulty. This act recites, that it is expedient to amend the 11 & 12 Vict. c. 45, and it enacts, “that notwithstanding anything in the said act contained importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies whereof the partners and associates are not less than seven in number, whether incorporated or unincorporated.”

rated, . . . other than and except railway companies." Now, the words are certainly very extensive, but still I must give them a reasonable construction. I cannot possibly hold that this applies to every association of seven persons; that would be utter nonsense. But where are we to stop, if clubs of the description of the present are to be included? Are we to include charitable clubs, which would come within the same description? There, there are entrance fees, and certain benefits which members of the higher description of clubs would not have. There must, therefore, of necessity, be a limited construction put upon the words of the statute, otherwise nearly every club that exists would come within its effect. Observe what follows in the 1st section — "Provided always, that . . . the court shall, in considering the necessity or expediency of any such dissolution, . . . have regard to any articles of partnership or other contract which shall be subsisting between the members of such partnership, association, or company." Now, although the word "association" is here used, and though an "association" may include bodies of persons who are neither partners nor members of a company, properly so called, yet it would be difficult to convince me that the word "association," occurring as it does between these two words, "partnership" and "company," is to be treated generally — that is, to mean every association, without reference to the particular bodies with which the term is so closely associated. I think the safest thing for me to do is as Lord Bacon did in treating upon uses, not to take upon himself to say what were within the act of parliament, but to proceed negatively, and to say, as the occasions arose, what were not within the act; and I think that the present club or association of persons is not within this act of parliament; for, although it is an "association," yet it was not an association for the objects pointed at by the statute. Many a man belongs to a club which he never has entered, or does not enter for years. He may be turned out of the club for improper conduct, and he must go out if he does not pay his annual subscription. The right of a member continues if he pays, but it is lost the moment he ceases to pay his subscription. He cannot be compelled to pay. A "partnership," therefore, it is not. A commercial or trading "company" it is not. An "association" it is, but not an "association" within the meaning of the statute, considering between what words we find that word introduced in the statute. When I look, therefore, at this latter statute, I find that every provision in it is inconsistent with the notion that the legislature intended to include clubs in the word "association." If it did so intend, how is it that we do not find the word "club" in the act? Clubs are very well known to exist, and it is impossible to suppose that the word would not have found its way into the act, had the legislature intended to include them. And I think that the judges are bound not to extend unnecessarily the meaning of words thus ambiguous to institutions which are well known to exist to a very great extent, and might have been introduced by a word. I am always unwilling to take from words their natural import, both in acts of parliament and other instruments. I always endeavor to give the natural con-

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*In re The St. James's Club.*

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struction and import, unless I collect from the context that a different import was intended. Now, I think that nothing could be more mischievous than to hold that clubs of this nature should be deemed within the Winding-up Acts. If that be so as to these institutions generally, still I must look to the nature of this particular club, and the acts that have been done. This club is perhaps more open to the objection than any other, that it would be difficult to apply the Winding-up Acts to it, because it has such stringent powers of exclusion over members for conduct out of the house; and I think it would be impossible to bring this case within the act of parliament. But then it is said that there have been considerable debts incurred for the purposes of the club, and that it is a case for contribution between the members. There is nothing clearer than this, that although any one individual member of a club is not answerable for the debts of the club *quâ* member, yet if he do concur, by any act or order, in contracting the debt, he then becomes liable like any other person in respect of his own contract and conduct. To what extent persons present at a general meeting, at which a resolution is passed, may have bound themselves, I am not called upon to decide; but the case of *Lord Mountcashell v. Robertson*, as stated to me, certainly goes to show that a resolution carried at a general meeting of a club did not create such an obligation as to give a right of action for contribution against a member present at that meeting. It seems to have been so laid down at *nisi prius*, and that was confirmed. But here there is nothing definite in the petition; indeed, it carefully avoids any statement as to who were present, or who are sought to be bound by the resolutions at that meeting. If ever there was a case where the petition ought to have clearly stated who the persons were who attended the general meeting, this is that case; for it is perfectly clear that a resolution then passed at the meeting, to the effect that those persons who had made use of the club, but had withdrawn, should remain liable, was contrary to law, unless, indeed, they had made themselves personally liable by their own acts. As to the acts of the committee, I think that the power they assumed was not authorized by the 12th clause, and that they exceeded their powers by borrowing from the bankers, Messrs. Herries, the 5,000*l.*, and that they did not, by so doing, create any liability which could affect the general members of the club. Some of the members of the committee gave their joint and several promissory notes for this sum, which of course would render those individuals liable. The club was started upon this ground, and upon this assumption, that they would have a certain sum of money coming in from entrance fees and subscriptions, and that these annual sums would cover the whole expenses. There was no power, express or implied, to raise money by the debentures of the club; but at a general meeting they resolved to raise money on debentures. We have it stated upon the petition what was done at the general meeting, but not one word as to who were present. No personal liability, therefore, was thereby incurred by the general members of the club. Then it is said that although the general members may not be liable to creditors, yet *inter se* they are liable to contri-



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*Hiorns v. Holtom — Fortnam v. Holtom.*


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bute. That is the whole fallacy. If, indeed, they could make that out, it might support the argument; but it is not so; the members are not liable to any thing beyond what they undertook to do upon becoming members, namely, to pay their entrance fee and subscriptions; and they could escape from the payment of the subscriptions whenever they should think proper to retire from the club. Looking, therefore, at the proceedings, I think that they are not such as would bind any person except those who actually concurred, and I am not told who they are. And although I have gone through the petition with a view to see what were the proceedings in this case, yet they do not appear to me to have any real bearing upon the present question; for if this club is not within the Winding-up Acts as an "association," then no subsequent acts of the managing body, not authorized by the contract, could bring it within the acts. This is simply a club like clubs in general, and I am clearly of opinion that it is not an "association" within the meaning of the act of parliament.

*Bacon* asked for the costs; but

The LORD CHANCELLOR thought it was not a case in which costs ought to be asked.

*Appeal allowed, without costs.*



### HIORNS v. HOLTOM — FORTNAM v. HOLTOM.<sup>1</sup>

November 22 and 23, 1852.

*Fraud — Costs of disclaiming Defendant — Sale instead of Foreclosure, under the 15 & 16 Vict. c. 86, s. 48.*

A's solicitor agreed with B, that 1,000*l.* of A's money should be advanced to B on a second mortgage of property already in mortgage for 1,000*l.* A mortgage, dated the 16th February, 1842, was prepared accordingly, and executed by B no money passing. As soon as A heard of the transaction he repudiated it, but agreed to advance 2,000*l.* on a transfer of the first mortgage and a further charge. This was carried out by a deed of transfer and further charge, dated the 28th February, 1842. The deed of the 16th February was not cancelled, but remained in the possession of A's solicitor. In 1844 the solicitor advised C to advance 1,000*l.* on a transfer of the security of the 16th February, 1842. C paid the money to the solicitor, who handed over to C the deed, with a memorandum, which he had fraudulently induced A to sign, undertaking to transfer the mortgage. The solicitor employed the money for his own purposes. In 1848, the solicitor, by fraud, induced A to execute to C a deed of transfer of the mortgage of the 16th February, 1842, and to sign a receipt for the 1,000*l.* This deed contained words sufficient to pass the legal estate, which A had in him by virtue of the deed of the 28th February, 1842:—

*Held*, that as A, by signing the memorandum of 1844, had enabled the solicitor to commit the fraud, the consequences of such fraud must, as between A and C, be borne by A; and that C was entitled to half the benefit of the security of the 28th February, 1842.

*Quære*, whether the deed of 1848 passed the legal estate, when its only object was to transfer the benefit of a deed which did not pass, nor purport to pass, the legal estate?

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<sup>1</sup> 16 Jur. 1077.

*Hiorns v. Holtom — Fortnam v. Holtom.*

*Held*, that A must pay all the costs of the suit instituted by C to obtain her rights, except the costs of the mortgagor and those of a defendant who ought not to have been made a party.

*Held*, also, that the mortgagor was to blame in not having taken care that the deed of the 16th February, 1842, was cancelled, and that he, therefore, must bear his own costs.

A defendant, who had been a mortgagee of the equity of redemption of the property, disclaimed by his answer, stating that his mortgage had been satisfied before the bill was filed, and that, if any application had been made to him before making him a party, he would then have disclaimed:—

*Held*, that he was entitled to his costs.

A sale will not in general be ordered, under the 15 & 16 Vict. c. 86, s. 48, instead of foreclosure, unless there is such complication that the common decree cannot be conveniently worked.

In October, 1840, Samuel Robbins mortgaged certain freehold property in Gloucestershire to secure 1,000*l*. In 1842 he applied to his solicitor, Charles Handley, of Warwick, to procure him a further sum of 1,000*l*. on the same property. Handley was also the solicitor of Joseph Holtom, and agreed with Robbins to procure him an advance of 1,000*l*. from Holtom on the security of a second mortgage of the property. A deed, dated the 16th February, 1842, was accordingly prepared without Holtom's knowledge, purporting to be a mortgage of the property by Robbins to Holtom, to secure 1,000*l*., subject to the mortgage of 1840. This deed was executed by Robbins, but no money passed. Holtom, as soon as he was informed of the transaction, repudiated it, and refused to advance his money on a second mortgage, but agreed to pay off and take a transfer of the mortgage of 1840, and to advance 1,000*l*. to Robbins on the security of a further charge, so as to be, in fact, a first mortgagee for 2,000*l*. This arrangement was carried out by a deed of transfer and further charge, dated the 28th February, 1842, which did not notice the incomplete transaction of the 16th February. The deed of the 16th February, 1842, was not cancelled, but was retained by Handley ostensibly for the purpose of having the stamp duty returned. In June, 1842, Samuel Robbins mortgaged the property for 500*l*. to E. Tatnall, subject to the mortgage of the 28th February, 1842, and this mortgage for 500*l*. was afterwards transferred to Richard Hiorns, the plaintiff in the first suit. In 1844, Mrs. Fortnam, (one of the plaintiffs in the second suit), then Mrs. Wilkes, widow, had money which she wished to invest, and applied to Handley for that purpose. Handley stated to her that Holtom had two mortgages for 1,000*l*. each on the property of Samuel Robbins, and wished to raise 1,000*l*. and he recommended her to advance that sum on the security of a transfer of the mortgage of the 16th February, 1842. Mrs. Fortnam accordingly paid 1,000*l*. to Handley, who delivered to her the deed of the 16th February, 1842, with a memorandum, signed by Holtom, in the words following:—

“ *Memorandum*, 1844.

“ March 13.

“ *Memorandum*. I, the undersigned Joseph Holtom, of Blockley, in the county of Worcester, farmer, do hereby undertake and agree, when called upon so to do, to assign to Mrs. R. Wilkes, of Brailles,

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*Hiorns v. Holtom — Fortnam v. Holtom.*

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in the county of Warwick, widow, or to whom she may direct, a certain indenture of mortgage, dated the 16th day of February, 1842, on property at Mickleton, in the county of Gloucester, for securing the sum of 1,000*l.*, and interest, from Mr. Samuel Robbins to me.

“*JOS. HOLTOM.*”

“*Witness — CHARLES HANDLEY.*”

The money was applied by Handley to his own purposes. Many applications were made by Mrs. Fortnam for a legal transfer, but were evaded by Handley until 1848, when Mrs. Fortnam's affairs were placed in the hands of another solicitor. In March, 1848, Handley delivered to Mrs. Fortnam's solicitor a deed dated the 1st March, 1848, executed by Holtom, and with the proper receipt indorsed, being a transfer to a trustee for Mrs. Fortnam of the security of the 16th February, 1842. This transfer was in the form usual in transfers of mortgages passing the legal estate, and contained the usual grant of “all the estate, right, title,” &c. Mrs. Fortnam married her present husband shortly after the execution of this deed, and the money secured by it was made the subject of a settlement. Under these circumstances, Hiorns filed his bill for redemption and foreclosure against Holtom, Mrs. Fortnam and those claiming under her, the mortgagor, and some subsequent incumbrancers, praying a declaration that he was entitled to redeem both Holtom and Mrs. Fortnam on payment of 2,000*l.* only. Mrs. Fortnam and her trustees filed their bill against Holtom, Hiorns, the subsequent incumbrancers, and the mortgagor, praying that they might be declared entitled to the benefit of the security of the 28th February, 1842, to the extent of 1,000*l.*, and for consequential relief. Holtom resisted this claim, on the ground that Handley had for his own purposes procured from him by fraud the signature of the memorandum of 1844, and the execution of the transfer of 1848. It was not disputed by any party that the obtaining the 1,000*l.* from Mrs. Fortnam was a fraudulent scheme, devised by Handley for his own benefit; the question was, who was to bear the consequences of this fraud. The two causes came on to be heard together.

*Lloyd* and *J. V. Prior*, for Hiorns, contended that Hiorns had a lien on the estate for 500*l.*, subject only to the 2,000*l.* secured by the deed of the 28th February, 1842, and not subject to the further sum of 1,000*l.* That Handley was solicitor for both parties in the transaction relating to the advance by Mrs. Fortnam in 1844; and that such parties had, therefore, constructive notice of Hiorn's mortgage, the interest on which was regularly paid through Handley. That whatever effect the transactions with Mrs. Fortnam might have as between the parties to them, they could not let in an additional charge of 1,000*l.* in priority to the charge of Hiorns, who was in no way privy to such transactions.

*Bird*, for Garrett, a mortgagee subsequent to Hiorns. The deed of transfer of 1848 could not pass the legal estate, as nothing more

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*Hiorns v. Holtom — Fortnam v. Holtom.*

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was intended than a transfer of the security of the 16th February, 1842, which did not purport to pass any legal estate.

[Sir J. ROMILLY, M. R. That question does not concern you, if I hold that Holtom and the Fortnams take only 2,000*l.* between them.]

If the legal estate did pass, that makes no difference; in a mortgage transaction the debt is the principal, the land only the accessory. Now, there was no debt due on the pretended security of the 16th February, 1842; so that in the view of a court of equity the transfer passed nothing.

*R. Palmer and W. M. James*, for Mrs. Fortnam. Holtom had two deeds, one of which superseded the other. Whatever may have been the actual custody of the first, it must, as regards us, be taken to have been in Holtom's possession. It will be said that Handley was our solicitor in 1844. We do not dispute it; but Holtom's position is not bettered by that, for he signed a memorandum, in which he admits having the deed of the 16th February, 1842, and treats it as a subsisting mortgage. He afterwards executes a deed of transfer, the operative part of which is so worded as to be capable of passing the legal estate; he had the legal estate in him, it therefore passed to us; and what equity has he to take it from us without payment? According to Holtom's own statement, Handley told him that his signing the memorandum of 1844 would enable Samuel Robbins to raise 1,000*l.* Holtom therefore signed the memorandum for the purpose of enabling money to be raised on the estate, and is bound. *West v. Jones*, 1 Sim. (N. S.) 205; s. c. 3 Eng. Rep. 225. The documents which Holtom signed and gave to Handley were a sufficient authority to us to pay the money to Handley, and it is no fault of ours that it was misapplied by him.

*L. Field*, for parties claiming under Mrs. Fortnam's settlement.

*W. T. S. Daniel and Rodwell*, for Holtom. First, the deed of 1848 is void as against Holtom, for fraud. Handley was not our general agent, and never had authority to raise money for us.

[Sir J. ROMILLY, M. R. You gave him documents which enabled him to represent that he had; that is the difficulty of your case.]

Handley came to us representing himself as the agent of Robbins, and practised a fraud on us. How can we be bound by that? The memorandum of 1844 is not in such form as to be an operative agreement; and Mrs. Fortnam could not have enforced it against us. Even if she could, it gave her no right but to call for a transfer of the security of the 16th February, 1842, which was void.

[Sir J. ROMILLY, M. R. Does not the memorandum estop you from saying it was void?]

Four years afterwards the deed of transfer was executed, but its execution was obtained by fraud, so how can it give Mrs. Fortnam a better right than she had before?

[Sir J. ROMILLY, M. R. If you allege the deed to be void by fraud, you ought to file a bill to have it cancelled.]

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*Hiorns v. Holtom — Fortnam v. Holtom.*

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That would be so if the deed were void only in equity, but a bill is unnecessary where it is void at law. Secondly, the deed could not pass the legal estate, for it is clear on the face of it that it was not intended to pass any. *Bac. Ab.*, "Release," K., 633; *Ramsden v. Hilton*, 2 Vern. 309; *Cole v. Gibson*, 1 Vern. 506; *Lord Braybrooke v. Inskip*, 3 Ves. 417; *Faussett v. Carpenter*, 2 Dow & C. 232.<sup>1</sup> Mrs. Fortnam, then, must take subject to all prior equities, and she has no equity against us. At all events, not having the legal estate, she cannot claim priority over us. Thirdly, in any case the court will not take from Holtom the title deeds, which are still in his possession.

*Roberts*, for the mortgagor, asked that all costs occasioned by litigation about the transactions with Mrs. Fortnam might be disallowed as against the estate.

[Sir J. ROMILLY, M. R. I shall not give any costs in *Fortnam v. Holtom* out of the estate. I suppose you do not contend that the costs of *Hiorns v. Holtom*, ought not to follow the general rule?]

Yes; we claim that all extra costs in that suit occasioned by the disputes between Holtom and the Fortnams should be disallowed.

[Sir J. ROMILLY, M. R. I do not see that there are any.]

*H. Cadman Jones*, for Garner, a mortgagee of the equity of redemption, asked that each bill might be dismissed as against him, with costs. This defendant disclaimed, by his answer, stating that his mortgage had been satisfied in November, 1850, two months before either bill was filed, and that if any application had been made to him before he was made a party, he would have disclaimed then, and executed a deed of disclaimer if wished.

[*W. M. James*. He does not say that he ever reconveyed.]

He had nothing to reconvey. The interest of a mortgagee of an equitable estate determines *ipso facto* when he is paid off.

Sir J. ROMILLY, M. R. Mr. Palmer, there is only one point on which I wish to hear you reply. Could the deed of 1848 pass the legal estate, when its only object was to transfer a security which did not purport to pass it?

*Palmer*. If your honor considers that we have an equity against Holtom, it will probably not be necessary to argue that point. We only bargained for a security for 1,000*l.*, subject to a prior security for 1,000*l.*, and we do not ask more than that.

Sir J. ROMILLY, M. R. As you do not claim to be paid in full, if the estate is not worth 2,000*l.*, I need not call on you to reply; and I need only state shortly my reasons for holding that Mr. Holtom cannot contend that Mrs. Fortnam is not entitled to 1,000*l.* out of the 2,000*l.* secured to him on the property. Handley having arranged with

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<sup>1</sup> See as to this case *Sugd. V. & P.*, 1022.

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*Hiorns v. Holtom — Fortnam v. Holtom.*


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Mr. Robbins to procure him an advance of 1,000*l.* from Mr. Holtom on the security of a second mortgage of this property, which was already in mortgage for 1,000*l.*, a deed of the 16th February, 1842, was accordingly prepared for carrying out this arrangement, and was executed by the mortgagor. Mr. Holtom, as soon as he was informed of this transaction, repudiated it. The deed was never acted upon; but in lieu of it a deed of the 28th February, 1842, was executed, by which Holtom became a sole mortgagee of the property for 2,000*l.* The deed of the 16th February was never cancelled, but remained in the possession of Handley, who had acted as solicitor for all parties. Handley afterwards proposed to Mrs. Fortnam that she should invest 1,000*l.* on the security of this deed, and he got Holtom to sign a memorandum undertaking to transfer that mortgage to her. Now, what is Holtom's own account of this transaction? He says that Handley came to him as the solicitor of Robbins, the mortgagor, and told him that Robbins wanted to raise 1,000*l.* on the property, but could not do so without Holtom signing this memorandum. Holtom then asked whether it would affect his own security. Handley said it would not; and Holtom then signed it. How could he suppose that his signature was of any use if it was not to affect his interest in the property? Much stress has been laid in argument on the form of the memorandum, because it contains no statement that it was given for raising money; but it is clear from Holtom's own statement that he gave it for the very purpose of enabling money to be raised. Then four years afterwards he executes a deed in conformity with the memorandum, and signs a receipt for the money, and now he turns round and says, after all this, that he did not know what he was doing, and that the deed, in the hands of persons who innocently advanced money on the faith of the memorandum signed by him, is void. I never met with any case where such a contention has been allowed. In *Kennedy v. Green*, 3 My. & K. 699, a case of gross fraud, it was treated as clear that a purchaser for value was safe, unless he had actual or constructive notice of the fraud. It is impossible to say that, as between Mrs. Fortnam and Mr. Holtom, Mrs. Fortnam is to be the person to suffer by the fraud, where Mr. Holtom has executed such a deed as this. The deed is unimpeached, no proceedings having been taken to set it aside. It is not a deed void at law on the face of it, as in *Simpson v. Lord Howden*, 3 My. & C. 102, and it cannot be treated as void. There must be a declaration that Mrs. Fortnam is entitled to half the benefit of the mortgage of the 28th February, 1842; and there must be one decree for redemption and foreclosure in both suits. Then, as to costs, the plaintiffs in *Fortnam v. Holtom* must pay the costs of all the defendants in that suit, except Holtom, Garner, and the mortgagor, and have them over together with their own costs, against Holtom. I was at first disposed to make Holtom also pay the mortgagor's costs of *Fortnam v. Holtom*, but I think that the mortgagor was to blame in not seeing that the deed of the 16th February was cancelled, and, therefore, ought not to receive any costs. The costs in *Hiorns v. Holtom*, except those of Garner, will follow the common rule in redemption and foreclosure suits.

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Hiorns v. Holtom — Fortnam v. Holtom.

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Each bill to be dismissed as against Garner, with costs, to be paid by the plaintiffs.

*J. V. Prior*, for Hiorns, submitted, that as Garner was made a party in *Hiorns v. Holtom*, because Garrett by his answer insisted that he was a necessary party, Hiorns ought to have Garner's costs over against Garrett.

Sir J. ROMILLY, M. R. If a plaintiff chooses to make a person a party without first asking him whether he has any interest, he must take the consequences if it turns out that the party had no interest, and did not claim any.

*Bird* suggested that this was a proper case for the court to order a sale, under the 15 & 16 Vict. c. 86, s. 48. There were three mortgages — the 2,000*l.* mortgage of the 28th February, 1842; Hiorns's mortgage for 500*l.*; and Garrett's subsequent mortgage; and there was no doubt that the estate was encumbered beyond its value.

*Lloyd* and *Palmer* concurred.

Sir J. ROMILLY, M. R. I feel reluctant to order a sale, unless by consent, except in cases where there is such complication that the common decree cannot be conveniently worked. I do not think that this is such a case. You may have the decree drawn up in the way you ask, if all the parties agree to it.

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ance of such an agreement. *Winch v. The Birkenhead, Lancashire, and Cheshire Junction R. Co.*, 506.

2. *Not Illegal.*] An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement. *Ib.*

See EVIDENCE.

### AMENDMENT.

See CREDITOR'S SUIT. PRACTICE.

### ANNUITY.

See TRUSTS.

### APPEAL.

*Costs on.*]

See COSTS.

### ASSIGNMENT.

See INSOLVENCY. VOLUNTARY SETTLEMENT.

### AUCTION.

1. *Owner may be Auctioneer.*] There is nothing fraudulent in the mere fact of an owner of property acting as auctioneer at a sale. *Flint v. Woodin*, 278.
2. *Puffer.* A puffer who bids by degrees up to his limit, instead of making his utmost bid at once, is not acting in fraud of the *bonâ fide* bidders. *Ib.*

See VENDOR AND PURCHASER.

### BANKING COMPANY.

1. *7 Geo. 4, c. 46.*] In April, 1847, a joint-stock banking company, carrying on business under the provisions of the 7 Geo. 4, c. 46, of which A was a member, became indebted to B in the sum of 5,000*l.* A continued to be a partner until his death, and died in December, 1847. In April, 1848, B recovered judgment against the public officer of the company. In December, 1848, the usual decree for accounts was made in a suit for the administration of the estate of A. B presented a petition for liberty to go in before the Master and prove, as a creditor against A's estate, for 5,000*l.* and interest. The petition did not state that the bank had ceased to carry on business, or that any proceedings had been taken to enforce the judgment against the existing partners. The petition was dismissed. *Heward v. Whealley*, 214.
2. *Receiver — Separate Accounts.*] The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff, against the bankers, to refund this balance so transferred, it was held—that, according to the principles of a court of equity, a person who deals with another knowing him to have in his hands, or under his control, moneys belonging to a third person, must not enter into a transaction with him, the effect of which is that a fraud is committed on the third person; and it appearing upon the

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evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate, a decree was made against the bankers, for repayment of the amount. *Bodenham v. Hoskins*, 222.

See WINDING-UP ACTS.

BANKRUPTCY.

1. *Consolidation Act—Railway Stock.*] The 201st section of the act enacts, that no bankrupt shall be entitled to his certificate if he shall within one year before his bankruptcy have lost 200*l.*, by any contract for the sale or purchase of "any government or other stock:"—  
*Held*, on appeal, affirming the decision of the commissioner, that railway stock is within the meaning of this section. *Matheson, in re*, 482.
2. *Refusal of Certificate.*] Whether the court of appeal has jurisdiction to refer back the question of certificate after the commissioner has refused it, *quære*. *Whitaker, ex parte*, 522.
3. Whether the grant of the certificate by the commissioner after he has once refused it would be valid, *quære*. *Ib.*
4. *Annulling Adjudication.*] Where a creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the commissioner's decision on his petition, his appeal is in time under the 12th section of the statute. *Bean, in re*, 523.
5. *Appeal.*] A petition to the commissioner to annul the adjudication is not an appeal within the meaning of that section. *Ib.*
6. *Fraudulent Preference.*] A bankrupt, having had his certificate refused, was taken in execution, and lodged in gaol. The ground of the refusal of the commissioner was a fraudulent preference within the 256th section of the 12 and 13 Vict. c. 106; but the Court of Appeal being of opinion that such a charge was not sustained, granted a certificate of the third class, and directed the release of the bankrupt from prison on a given day. *Hunt, in re*, 538.
7. *Friendly Society.*] Money which, by the rules of a friendly society, ought to have been deposited with a treasurer appointed by the society, was paid directly to the bankers of the society. The bankers were adjudicated bankrupts, and the society, under the 167th section of the Bankrupt Act, claimed to be paid in full, and in support of the claim filed an affidavit, swearing that the bankers were "employed in the office of treasurer:"—  
*Held*, that the petitioners were not entitled to payment in full. *Orford, in re*, 540.
8. *Certificate Meeting.*] The commissioner has authority under the 198th section of the act to appoint a sitting for the consideration of the grant of a certificate to a bankrupt, although the bankrupt does not make the application himself. *Sherlock, in re*, 548.
9. *Bankers' Certificate.*] Bankers who, upon the evidence before the court, must be taken to have been, and to have known that they were deeply insolvent, continued to receive deposits, and to issue notes for a period of eighteen months, during which time their assets would not pay more than 5*s.* in the pound; on an adjudication of bankruptcy, the commissioner for this, among other reasons, refused them any certificate or protection. On appeal, the court affirmed the refusal of certificate on the above-stated ground, but, upon the consent of the assignees and of the opposing creditors, granted protection to their persons. *Rufford, in re*, 542.
10. The certificate is a benefit to which a bankrupt may entitle himself by good conduct. *Ib.*
11. Whether, after a refusal of a certificate, the grant of protection is of any avail against the common law right of creditors who do not come in under the bankruptcy, *quære*. *Ib.*

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12. *Trading—Scrivener.*] A solicitor was adjudicated bankrupt as a scrivener, on evidence clearly establishing the fact; on appeal against the adjudication, he was examined, and the court being satisfied that, upon the additional evidence, he was not a scrivener within the meaning of the bankrupt law, annulled the adjudication; the lord chief justice expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs. *Dufaur, in re*, 550.
13. *Certificate.*] A, a tallow-broker in business with B, became bankrupt, and on application for his certificate had the same suspended for two years, and then to be of the third class. The case of suspension was supported by the commissioner on two grounds; first, that the bankrupt had fraudulently induced a creditor to forbear enforcing payment of a certain sum, by withholding information known to him and not known to the creditor, and which, if known, would have induced the creditor to enforce payment; the other case was for receiving money for goods alleged by the bankrupt to have been purchased, and then re-transferring the goods to the person of whom he bought them, so that the creditor did not receive the goods, and lost his money. The lords justices were of opinion that the withholding of information, or the silence of the bankrupt regarding that information, was not dishonestly intended in the one case, and the act by which the goods were re-transferred and the money lost in the second case was, upon the evidence before the court, not fraudulent, so far as the petitioner was concerned, and therefore they granted an immediate certificate of the first class. *Gull, ex parte*, 557.
14. *Certificate.*] E. M. and H. M. purchased a business of their brothers, but it was not paid for. E. M. attended to the accounts, so far as they were attended to, and H. M. performed the duties of traveller to the business. E. M. and H. M. on various occasions raised money by deposits of goods, and paid 60% per cent. for discount. H. M. ordered goods one day and pledged them on the next. The brothers, the vendors of the business, sued for the purchase-money and issued execution on a judgment in the action. Both E. M. and H. M. were adjudicated bankrupts, and the commissioner refused them their certificates or protection, on the ground of not keeping proper books of account (as to E. M., destruction of books), obtaining goods for the purpose of pledging, and pledging them, and fraudulent preference to the brothers who sold the business. H. M. appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books, and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The lords justices were of opinion that there was no wrong intention as to the books or the pawning, and that there was pressure by the vendors, and, acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months after the adjudication. *Martyn, in re*, 562.
15. *Allowance to Official Assignee.*] The 54th section of the statute having enacted that certain amounts, not less nor greater than specified amounts per cent. on the gross produce, from time to time should be paid by official assignees to the "chief registrar's account," the amount to be fixed by the senior commissioner, with the approval of the Lord Chancellor; and the chief commissioner having fixed the sums, with such approval, the court refused to interfere to alter the same; but the commissioner having made such allowances to the official assignee, as, according to the amount of the bankrupt's estate and the nature of the duties performed, were, in his opinion, just and reasonable, the court differing from the opinion of the commissioner, and the official assignee not requesting the court to fix the amount of allowance, the matter was, on this point, sent back to the commissioner for reconsideration. *Glyn, ex parte*, 566.
16. *Conduct as a Trader.*] A bankrupt, who had twice before compounded with his creditors, made false and fraudulent entries in his books, consisting of fictitious accounts in particular names. He stopped payment, being at the time able to pay 12s. in the pound, and soon after offered 11s. in the pound. The commissioner refused him his certificate and all protection, excepting for the twenty-one days; and on appeal, the lords justices, acting under the discretion given by the 198th section of the act—"a discretion to be exercised on judicial grounds with reference to

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the nature of the case in general, and on its peculiar circumstances"—dismissed the petition of appeal, with costs, affirming the decision of the commissioner, and refusing any protection whatever, the conduct of the bankrupt being unfair, untradesmanlike and disreputable. *Curties, in re*, 571.

17. *Fraud—Falsehood—Certificate.*] A trader carried on business as a baker, and, before the statute 12 & 13 Vict. c. 106 came into operation, obtained money from J. on pretence that it should be invested on mortgage, which was not done. He also obtained money from F. on a similar pretence, which was not so invested. The trader became bankrupt, and the commissioner refused him any certificate; and, on appeal, held (dismissing the appeal), that the money of J. and the money of F. were obtained by fraud and falsehood; that on these grounds he was not entitled to his certificate; that before a bankrupt can ask for his certificate, he should have conformed to the bankrupt law since his bankruptcy; that if a trader so obtains money, though not in the course of his trade, or in matters connected with his business, it is, on a question of certificate, conduct as a trader, within the meaning of the act; and that if a case comes otherwise within the act, it is not the less so because the conduct complained of took place before the passing of the act. *Staner, in re*, 576.

18. *Trader—Debtor—Summons.*] A creditor, a wholesale dealer, issued a summons under the 78th section of the act, demanding payment of money due from a retail dealer in the same line of business, and described the items in the particulars of demand as "goods:"—

*Held*, that this described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty. *Bowers, in re*, 582.

19. *Certainty.*] The situation of parties and nature of demand are to be considered in determining what is convenient certainty. *Ib.*

20. *Doubts.*] A doubt on the legal validity of an adjudication is not sufficient ground for annulling it. *Ib.*

21. *Winding-up Acts—Separate Creditors.*] A. B. was a shareholder in a joint-stock banking company, which stopped payment. He became bankrupt, and afterwards, before he obtained his certificate, an order for the winding up the affairs of the banking company was obtained, and, subsequently, he obtained his certificate. The commissioner in bankruptcy declined to permit the official manager to prove for the amount of calls on the bankrupt's shares; but the court held that, under the 14th and 30th sections of the Winding-up Act of 1849, the official manager was entitled to go in, and prove for the amount of calls in competition with his separate creditors. *Nicholas, ex parte*, 586.

See HUSBAND AND WIFE. MARRIAGE SETTLEMENT. PARTNERSHIP.

## BOND.

See INSURANCE.

## BARON AND FEME.

See HUSBAND AND WIFE.

## BASTARD.

See WILL.

## BEQUEST.

*When absolute.*]

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## BISHOP.

See COPYHOLD ENFRANCHISEMENT ACT. COSTS.

## BURDEN OF PROOF.

See EXECUTORS.

## CALLS.

See WINDING-UP ACTS.

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## CHAMPERTY.

See FRAUD.

## CHARITY.

1. *Trust Funds*.] The court will sanction the sale of a piece of land, which in 1747 was purchased by trustees with charitable funds and conveyed to them, it being plainly advantageous to the charity. *Overseer, &c., of Ecclesall Bierlow, in re*, 145.
2. *Real Estate*.] It will also sanction the reinvestment of the money in real estate; and the court will confer upon the trustees powers to perpetuate themselves, as well as to lease the land, there being such powers in the deed conveying the land to the trustees originally purchasing. *Id.*

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3. *Leases.*] In settling a scheme for letting lands belonging to a charity, a clause against assigning to "an indigent or improper person" omitted, as likely to lead to litigation. *Attorney-General v. Donnington Hospital*, 388.
4. *Accounts.*] Where the objects of a charity are numerous, and the sums to be distributed are small, the party charged with the distribution of the charity fund will be directed to lay annually a debtor and creditor account before the Attorney-General, and that notwithstanding there is a regular auditor of the accounts of the charity. *Ib.*

See PRACTICE.

CHOSE IN ACTION.

*Assignment of.*]

See INSOLVENCY.

CLUB.

1. *Power of Committee.*] One of the rules of a club was in these words: "All the concerns of the club, the domestic and other managements, and regulations for its establishment and management, shall be conducted by a committee of sixteen members." *Semble*, that this did not authorize the committee to raise money by debentures, or otherwise to pledge the credit of members. *St. James's Club, in re*, 589.
2. *Quære*, to what extent members of a club may bind themselves by being present at a general meeting at which a resolution is passed?

COMMISSION.

1. *Foreign witnesses.*] A testator gave the residue of his property to be held in deposit for the purpose of inquiring whether there were any relations of his blood living, and if so, the said residue was to be divided equally among them. Upon a reference to the Master to make inquiries in conformity with the above residuary bequest, the Master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next of kin. The court, upon the application of the executors, made an order for a foreign commission, and also directed what sum should be allowed out of the testator's property for the expenses of the commission. *Heath v. Chapman*, 56.
2. *To Examine Witnesses.*] The court having directed a commission to issue for the examination of witnesses upon the certificate of the Master, and that commission having miscarried, by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was directed by the court to issue without any further certificate of the Master. *Forsyth v. Ellice*, 51.

COMMITTEE.

*Of Lunatic — Liability.*] A sum of money having been lost to the estate of the lunatic under circumstances which the court considered to be the fault of the committee in not taking steps to enforce payment, the estate of the committee, who had died, was charged with the same. *Swindell, in re*, 159.

COMPROMISE.

1. *Letters of — How used.*] The court will discountenance all attempts to convert offers of compromise, by letter, into admissions prejudicial to the parties using them. *Jones v. Foxall*, 140.
2. *Observations as to the limited purpose for which such letters may be used.* *Ib.*

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## CONCEALMENT.

See FRAUD.

## CONFLICT OF LAWS.

1. *Mortgagor & Mortgagee.*] By the law of Demarara, lands cannot be mortgaged unless the intention to execute the mortgage be advertised in the Gazette, and the mortgage must be taken before a judge of the Superior Court. Any general creditor may, by an entry on the Rolls, prevent such mortgage from being taken. M., in 1845, contracted for the purchase from G. of certain lands in Demarara. In 1846, M. executed in England, in the usual English form, a mortgage of the lands to W., for securing the balance of the purchase-money advanced for M. by W. None of the preliminaries required by the law of Demarara had been previously observed. Then G. conveyed the lands to M., but by an accidental informality some parcels were omitted. Then M. became bankrupt. By the law of Demarara, a bankrupt's assignees have full and sole power to sell all his real estate. The assignees entered, and sold all the lands accordingly, both those which had been formally conveyed to M. and those parcels which, by accident, had not been conveyed:—  
*Held*, first, that the *lex loci rei sitæ* must govern the application of the proceeds of the sale of the estate, just as much as of the estate itself. *Waterhouse v. Stansfeld*, 465.
2. *Sale of Lands.*] Secondly, that there was no difference between the lands formally conveyed to M. and the lands accidentally omitted to be conveyed. *Ib.*
3. *Lex fori.*] Thirdly, when the law of a foreign country places a restraint upon the alienation of property, a contract here respecting that property cannot be enforced against the foreign law. *Ib.*

## CONSIGNMENT.

See PLEDGE.

## CONSOLS.

See WILL.

## CONSTRUCTIVE TRUST.

See TRUSTEE ACT.

## CONTRACT.

*By Father to a child.*] A father bound himself to give his daughter a marriage portion of 2,000*l.*, and said that she was and should be noticed in his will. He had previously made a will, giving her a lac of rupees; but afterwards he made another will, which, after giving all his property to his wife for life, and then to his two sons, gave the same, if they should die without issue, to his daughter's issue:—  
*Held*, affirming a decree below, that there was no contract by the father to give more than the 2,000*l.* *Moorhouse v. Colvin*, 167.

*When illegal.*]

See FRAUD. RAILWAYS.

## CONTRIBUTORY.

See RAILWAYS. WINDING-UP ACTS.

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CONVEYANCES.

See FRAUD.

COPYHOLD ENFRANCHISEMENT ACT.

*Costs of petition.*] A bishop, lord of a manor, enfranchised certain copyhold lands held of the manor under the Copyhold Enfranchisement Act, and the consideration money was paid into court. A petition was presented by the bishop for the investment of the money :—

*Held*, that the copyhold commissioners had a right to appear at the hearing of the petition, and that their costs of the petition and those of the bishop were payable out of the consideration money. *Bishop of Hereford, ex parte*, 55.

COPYHOLD.

*Surrender of.*]

See INFANT.

CORPORATION.

*Service upon.*] A railway company paid into court a sum of money for the purchase and severance of land taken by them belonging in fee simple to the mayor, aldermen, and citizens of L., and over which the freemen of L., 500 in number, had a right of pasturage. A special act was afterwards passed to enable the corporation to convey the land to the railway company, free from these rights of common, and it enacted that the purchase-money was to be applied for the permanent benefit of the freemen of L., as the Court of Chancery should direct, by any order to be made in the matter of that act, and *ex parte* the mayor, aldermen, and citizens of L.; and seven days' notice of any such application was to be given, by affixing the same to the town hall :—

*Held*, that some of the freemen of the city of L., or the Attorney-General, ought to be served with the petition. *Mayor, aldermen, &c. of Lincoln, ex parte*, 315.

See WINDING-UP ACTS.

COSTS.

1. *Trustee Relief Act.*] The costs of all parties of and incident to an application by the tenant for life for the payment to her of the income of a trust fund, which has been paid into court under the Trustee Relief Act, will be ordered to be paid out of the *corpus* of the fund, notwithstanding the parties entitled in remainder oppose such payment. *Field's Settlement, in re*, 11.

2. A trust fund had been paid into court under the Trustee Relief Act; the tenant for life petitioned for payment of the dividends to her :—

*Held*, that the costs of the application must come out of the income, and not out of the *corpus*. *Bangle's Trust, in re*, 28.

3. The case of *Ross's Trust*, 15 Jur. 241; s. c. 2 Eng. Rep. 148, disapproved of. *Id.*

4. *Immaterial Statements.*] An unopposed petition contained statements which were immaterial to the prayer. The court inserted in the order a direction to the taxing master, in taxing the costs, to have regard to such statements. *Hyder v. Coleman*, 54.

5. *On Appeal.*] Where the Master of the Rolls or a Vice-Chancellor has given substantial relief against a defendant, with costs against him personally, it is competent



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to this court, in affirming the decree as to relief, to vary as to costs, if its dissent from the decree as to costs is strong, clear and undoubting. *Reynell v. Sprye*, 74.

6. *Against a Solicitor.*] The court being of opinion that, although a solicitor had acted contrary to public policy, whether through misapprehension or otherwise, and although his duty professionally prohibited him from assisting where there was *aliud simulatum aliud actum*, and although he abetted in the composing and uttering of documents which recorded an affair as it was not, yet still as the court had no firm impression that the decree below ought to have charged him with costs, it refused to vary the decree in this respect. *Ib.*

7. *Railway Act—Bishops Court.*] By a railway act a company was empowered to take lands belonging to a vicarage, and it was declared that the purchase-money should be paid into court, and, that, on a petition by the vicar and patron, and with the consent of the ordinary of the diocese, it might be laid out in the purchase of other lands. A purchase was made accordingly:—

*Held*, that the bishop was entitled to be paid by the company, not only the costs of his attendance in the Master's office, but also of his appearances on the petitions to the court for a reference and confirmation of the Master's report. *The Vicar of Creech St. Michael, ex parte*, 132.

8. *Married Women—in forma pauperis.*] The Court of Chancery having given a married lady leave to sue *in forma pauperis*, on evidence that she could not procure a next friend, made a decree in her favor. One of the defendants appealed, but the appeal was dismissed with costs:—

*Held*, that the appellant defendant must pay the lady herself *dives* costs. *Wellesley v. Wellesley*, 148.

9. *Executors.*] The testator left the bulk of his property (all personal) to his wife, after a few pecuniary legacies. The testator left a large contract for wheat incomplete at his death, and was the personal representative of his deceased father's and brother's estates, in respect of which there were still unsettled claims. The executors paid the small legacies; but, before paying over any thing to the widow, required, as an indemnity, to have a large portion of the residue impounded for twenty years. The widow, first agreed, but afterwards withdrew her consent, and filed this bill for administration, and payment over. No additional claims were established either in respect of the wheat or the estates which the testator represented, or otherwise:—

*Held*, that though the period of twenty years was too long to ask to have the indemnity fund impounded, yet that the executors, the defendants, were entitled to their costs. *Cambray v. Draper*, 291.

10. *Necessary Suit.*] Where a suit has been rendered necessary by the conduct of one of the parties in not carrying an agreement into effect, he will not be fixed with the cost of that suit unless it is shown that all requisite and proper steps were taken by the other parties to the agreement, and that the party sought to be charged had notice of their intent to institute the suit, and to seek to fix him with the costs of it. *Harwood v. Burstall*, 323.

11. *Executors.*] In a suit to administer the estate of a testator, an executor had retained balances in his hands, and had subsequently become bankrupt:—

*Held*, that he was entitled to his costs, although he was charged with interest on the balances in his hands from time to time. *Cotton v. Clark*, 379.

12. *Set-Off.*] *Held*, also, that he was entitled to have his costs out of the estate, and that they were not to be set off against what should be found due from him in respect of interest on the balances in his hands. *Ib.*

13. *Of Disclaiming Defendant.*] A defendant, who had been a mortgagee of the equity of redemption of the property, disclaimed by his answer, stating that his mortgage had been satisfied before the bill was filed, and that, if any application had been made to him before making him a party, he would then have disclaimed:—

*Held*, that he was entitled to his costs. *Hiorns v. Holtom*, 596.

See COPYHOLD ENFRANCHISEMENT ACT. CREDITOR'S SUIT. EXECUTORS. FRAUD. RAILWAYS. SPECIFIC PERFORMANCE. TRUSTEE ACT. TRUSTEES. *Forsyth v. Ellice*, 54. *Jones v. Morrall*, 73. *Tookeys Trusts*, 44.

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COVENANT.

See INJUNCTION.

*When Illegal.*]

See AGREEMENT.

*Not to Sue.*]

See CREDITOR'S DEED.

*By Husband Towards Wife.*]

See HUSBAND AND WIFE.

CREDITOR'S SUIT.

1. *Mortgagee.*] A legal mortgagee may maintain a creditor's suit. *Groves v. Lane*, 376.
2. In such a suit an administrator *ad litem* of the deceased mortgagor does not sufficiently represent him. *Ib.*
3. The case stated on a claim must be such as would not render a bill demurrable if stated on a bill. *Ib.*
4. Amendment of defective claim allowed on payment of the costs of the day. *Ib.*

CREDITORS' DEED.

5. *Covenant not to Sue.*] By a creditors' deed, dated the 1st July, 1823, it was declared that certain life-estates, which had been previously conveyed to trustees, and certain policies should be held upon trusts, which were generally as follows:— The annual proceeds of the life-estates to be employed in keeping up the policies and paying certain interest, and then the balance was to be employed in paying off the principal of the debts enumerated in the first schedule to the deed, ratably, year by year. The moneys to be received under the policies, and the surplus (if any) of the annual proceeds of the life-estates, were to be employed in paying off the debts in schedule (2), and the surplus was to go to the debtor, Sir J. O. All the creditors were, if required, to make out the claims to the satisfaction of the trustees. The plaintiff was the personal representative of one of the creditors in the second schedule. The deed contained a proviso, the gist of which was, that in consideration of the arrangement thus made, Sir J. O. might remain in England without molestation. A suit of *O. v. K.* was, in 1847, instituted by the present plaintiff for carrying out the trusts of the deed and payment of the creditors, and afterwards, in 1849, the present suit for further carrying out the same purposes, by praying the usual administration accounts against Sir J. O.'s estate. Various arrangements had been attempted in 1850 and 1851, and on the 11th July, 1851, both the causes of *O. v. K.* and *O. v. O.* were brought on together by arrangement. The suit of *O. v. K.* was by consent dismissed, and the costs provided for; and in the present suit an order was made for an account of what was due to the plaintiff from the estate of Sir J. O., and the usual administration accounts. The Master reported nothing to be due from the estate of Sir J. O. to the plaintiff. The plaintiff took exceptions to this report, and also presented a petition of rehearing:—

*Held*, first, that the debt for which the plaintiff claimed was on the whole sufficiently established. *O'Brien v. Osborn*, 420.

6. *Release.*] Secondly, that the creditors' deed, allowing Sir J. O. to reside in England, without suit, molestation, &c., did not operate as a release to Sir J. O. *Ib.*
7. *Forfeiture.*] Thirdly, that the suit of *O. v. K.* for carrying out the trusts of the creditors' deed, did not operate as a forfeiture under the covenant not to sue. *Ib.*
8. *Limitations.*] Fourthly, that the covenant not to sue prevented the Statute of Limitations from running during the life of Sir J. O. *Ib.*
9. *Usury.*] The bonuses of the policies were to come to the creditors, and not to go to Sir J. O.:—

*Semble*, that this was not usurious. *Ib.*

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## DEBT.

See INJUNCTION.

## DEED.

*Set aside for Fraud.]*

See FRAUD.

## DEVISE.

See WILL.

## DISCLAIMER.

See EXECUTORS.

## DISCOVERY.

*Documents tending to Criminate.]* The bill alleged that the defendant had procured an order vesting the legal estate of certain lands in himself, by false statements, and that the Master's report in his favor had been obtained on evidence untrue and fraudulently concocted. The bill interrogated the defendant as to the tenancies of the lands in question, requiring him to set forth the names, terms, rents, &c. ; and it also prayed a discovery of the alleged fraudulent documents. The defendant refused to discover the precise terms of the tenancies, or to state what documents he had employed ; he admitted that he had let the premises, and that an order of the Court of Chancery had been made vesting the legal estate in him ; he denied all fraud ; denied the plaintiff's beneficial title, and affirmed his own ; and declared that the documents which he had made use of had been prepared with a view to litigation, but not to this litigation, and after litigation had commenced ; and that they did not support, or tend to support, the plaintiff's title, but that, on the contrary, they supported his, the defendant's title. The defendant also, at the bar, insisted that the effect of the discovery of documents would be, on the plaintiff's own showing, to expose the defendant to a prosecution for perjury :—

*Held*, that the answer was insufficient on both points. *Chadwick v. Chadwick*, 525.

## DISSOLUTION.

*Of Injunction.]*

See INJUNCTION.

## DIVIDENDS.

See RAILWAYS.

## DOMESTIC SERVANT.

*Who is.]*

See WILL.

## DOWER.

1. *Equitable Bar.]* Upon the marriage of an adult lady, a settlement was made, which was recited to be "for providing a competent jointure and provision for maintenance" for the lady in case she should outlive her intended husband, and for securing a provi-

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- sion for their issue; and it was agreed that the intended husband should give a bond to the trustees of the settlement, conditioned for the payment of 2,000*l.* within six months after the marriage, to be held by them upon trust for the husband for life, then for the wife for life, and then for the children of the marriage. The husband duly gave the bond, but only paid a small portion of the 2,000*l.*, and died, having sold real estate of which he was seised during the marriage:—
- Held*, that the settlement was a good equitable bar of dower, and, reversing the decision below, that she was not entitled to a lien upon the estate in respect of the provision that failed. *Dyke v. Rendall*, 404.
2. *Contract.*] Equitable bar of dower in this court depends entirely upon the doctrine of contract; and an adult lady may agree to take any consideration or security she pleases, and she takes it with all its defects. *Id.*
  3. *Dictum* of Sir A. Hart, in *Power v. Sheil*, 1 Mol. 311, overruled. *Id.*

ELECTION.

See WILL.

EQUITABLE ASSIGNMENT.

See VOLUNTARY SETTLEMENT.

EQUITY TO A SETTLEMENT.

See HUSBAND AND WIFE.

ESCHEAT.

See HUSBAND AND WIFE.

EVIDENCE.

1. *Agreement—Receipt—Stamp.*] A document purporting on the face of it to be a receipt for purchase-money, but inadmissible as evidence of the payment of the money for want of a sufficient stamp, is nevertheless admissible as evidence of the agreement for sale, if it contain the requisite terms—*Semle. Evans v. Prothero*, 163.
2. *Vide* a. c. 20 Law J. Rep. (N. S.) Chanc. 448; 2 Eng. Rep. 83, *contra. Id.*

See COMPROMISE.

EXCEPTIONS.

*To Master's Report.*] Where the Master has liberty to state special circumstances, it is entirely within his discretion to state any circumstances specially or not; and if he refuses to do so, exceptions to his report on that ground will be disallowed. *Knott v. Cottee*, 304.

EXECUTORS.

1. *Sale by Acting Executors.*] A testator devised his freehold estates to A, B, C, and D, and their heirs, on the usual trusts for sale. He then ordered and directed that A, B, C, and D, the executors of that his will, or the survivors or survivor of them, or the executors or administrators of such survivor, should sell his copyhold estates. He then gave all his personal estate to the same persons, and declared the trusts of

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- all the moneys to arise from his real and personal estate. A died in the lifetime of the testator. The testator died in 1830. B, and C, sold the copyhold estates in 1832. In 1851, D executed the usual deed of disclaimer. There was no evidence that D had refused to accept the executorship before the sale in 1832:—  
*Held*, first, that copyholds were within the 21 Hen. 8, c. 4; and, secondly, that, under that act the sale of the copyholds had been properly made by B and C. *Peppercorn v. Wayman*, 199.
2. *Rent paid by One.*] A house being let to A, A died, leaving B and C her executors. B continued to pay the rent, and it appeared to be the intention both of B and the landlord that B should be substituted in the tenancy; but C, the other executor, knew nothing of the intended change:—  
*Held*, that such change was inchoate only, and not perfected; and therefore A's estate still continued liable on the lease. *McDonnell v. Pope*, 11.
3. *Purchase of one—Executor—Lien.*] T. was appointed executor along with two others, and took also a beneficial interest in the estate. In 1844, a bill was filed for administration of the estate; in 1845, T. assigned certain leaseholds, in which he was beneficially interested to the extent of one third, to M, for securing his own debt. It turned out that at that time T. was also indebted to the estate:—  
*Held*, that the other executors had a lien on the leaseholds so mortgaged in preference to M.; and a bill against M. to establish that lien, and to obtain the title-deeds, (which were in M.'s possession), was allowed, with costs against M. *Cole v. Muddle*, 26.
4. *Liability for interest on Balances.*] In an administration suit by one executor against his co-executors, the pleadings raised a question of wilful default; but upon the hearing, a decree was made for the common accounts of what had been received, without any special direction or inquiry as to what might have been received but for the wilful default of the defendants. Upon the cause coming on for further directions, it was held that the plaintiff was then precluded from raising the question as to wilful default, but that if the question were still open, the plaintiff could not call upon his co-executors to account for what he jointly with them might have received.  
The plaintiff claimed interest upon balances remaining in the hands of the defendants:—  
*Held*, that the court was not precluded from entertaining this question by the decree, which might have afforded materials for forming an opinion; but the circumstances of this case were not such as to entitle the plaintiff to interest, there having been no improper retention of balances to any substantial amount. *Jones v. Morrell*, 69.
5. *Mortgage by Executor.*] An executor borrowed money upon a representation that it was wanted for the purposes of his testator's estate. The money was lent upon the personal security of the executor, who afterwards mortgaged part of the testator's property as a security for the money antecedently advanced:—  
*Held*, by the Vice-Chancellor, that the *onus* of proof lay on the person who advanced the money, to show that it was applied for executorship purposes: but  
*Held*, on appeal, that there was no evidence to show that the advances were not made for executorship purposes; and the bill to set aside said mortgage was dismissed. *Miles v. Durnford*, 120.
6. *Parties.*] The plaintiff was the representative not only of the executor who had borrowed the money, but also of the original testator, and in the latter character he sought to impeach the mortgage:—  
*Held*, by the Vice-Chancellor, that the plaintiff, although he was executor of the original testator, in which character he might sue, could not repudiate the character of representative to the executor, who could not sue: but  
*Held*, contra, on appeal. *Id.*
7. *Right of.*] A testator gave all his residuary real and personal estate to trustees, upon trust for his wife for life; and after her death he directed that a just and true valuation should be made of "all his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate," and directed the same to be divided, or considered as divided, into seven equal parts, and then disposed thereof; and the testator directed that A. B., one of his executors, who was a surveyor by profession, "should be entitled to charge, and should be allowed all reasonable charges as a surveyor, in valuing his said freehold and leasehold estates, and in letting the same, and

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in collecting the rents, or otherwise in the management of his said estates, whenever requested or instructed so to act by his cotrustees :—

*Held*, that this latter clause applied solely to the valuation and management of the freehold and leasehold estates, and that A. B. was not entitled, under this clause, to make any charges in respect of valuations made by him of the residuary personalty after the death of the testator's widow. *Knott v. Cottee*, 304.

8. *Indemnity—Costs.*] The testator left the bulk of his property (all personal) to his wife, after a few pecuniary legacies. The testator left a large contract for wheat incomplete at his death, and was the personal representative of his deceased father's and brother's estates, in respect of which there were still unsettled claims. The executors paid the small legacies; but before paying over any thing to the widow, required, as an indemnity, to have a large portion of the residue impounded for twenty years. The widow, first agreed, but afterwards withdrew her consent, and filed this bill for administration, and payment over. No additional claims were established either in respect of the wheat or the estates which the testator represented, or otherwise :—

*Held*, that though the period of twenty years was too long to ask to have the indemnity fund impounded, yet that the executors, the defendants, were entitled to their costs. *Cambray v. Draper*, 291.

9. *Liability of—Interest.*] A testator, by his will, gave his residuary real and personal estate to trustees, upon trust for his wife for life, and after her decease upon trust for his children; and he directed that after the death of his wife, and during the minority of any of his children, the trustees should apply, towards the maintenance of his children, a certain portion of the income of their then expectant shares, and accumulate the surplus income of each such share at compound interest. After the death of the widow, the sole surviving trustee neglected to accumulate the surplus income of each child's share, and invested large portions of the testator's estate in exchequer bills and other securities not authorized by the trusts of the will :—

*Held*, that the investments which had been made being improper investments, the executor was chargeable in the same manner as if he had retained the moneys in his own hands, but under the circumstances of the case, as it did not appear that he had benefited himself by it, and had not employed the sums so retained in trade, that he was chargeable only with interest at 4l. per cent. *Knott v. Cottee*, 304.

10. *Breach of Trust.*] *Held*, also, that as the trustee had been guilty of a breach of trust in neglecting to accumulate the surplus income of each child's share, he was to be charged with annual rests. *Ib.*

11. *Costs.*] *Held*, also notwithstanding he was chargeable as above, that he was entitled to his usual costs of suit, as between solicitor and client, out of the estate. *Ib.*

12. *Costs.*] In a suit to administer the estate of a testator, an executor had retained balances in his hands, and had subsequently become bankrupt :—

*Held*, that he was entitled to his costs, although he was charged with interest on the balances in his hands from time to time. *Cotton v. Clark*, 379.

13. *Costs out of Estate.*] *Held*, also, that he was entitled to have his costs out of the estate, and that they were not to be set off against what should be found due from him in respect of interest on the balances in his hands. *Ib.*

*Liability for default of Testator.*]

See LUNATIC.

FACTOR'S ACT

1. 5 & 6 Vict. c. 39.] The plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him, as an advance, upon account of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods

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to recoup himself the bills drawn upon him by the Liverpool merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be decreed to pay him the amount produced by the sale of the pearls :—  
*Held*, affirming the decree of the court below, that the pledge was valid within the 5 & 6 Vict. c. 39, as made *bond fide* and in the ordinary course of business. *Narulshev v. Brownrigg*, 261.

2. *Notice.*] Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; *secus*, if the pledgee had notice that the consignee was prohibited from pledging. *Ib.*

## FORECLOSURE.

1. *Decree.*] On a claim by a judgment creditor against his debtor in respect of certain real estate belonging to the debtor, the court refused to give a decree of foreclosure. *Footner v. Sturgis*, 150.
2. For a decree against mortgagor and subsequent judgment creditors, fixing one time for them all to redeem, see *Slead v. Banks*, 415.
3. *Form of Order.*] For a form of an order for a sale in a foreclosure suit, under s. 48, 15 & 16 Vict. c. 86, see *Staines v. Rudlin*, 429.
4. *Sale.*] A sale will not in general be ordered, under the 15 & 16 Vict. c. 86, s. 48, instead of foreclosure, unless there is such complication that the common decree cannot be conveniently worked. *Hiorns v. Holtom*, 596.

## FOREIGN LAWS.

See CONFLICT OF LAWS.

## FOREIGN RAILWAYS.

See RAILWAYS.

## FOREIGN TRUSTEES.

See TRUSTEE ACT.

## FORFEITURE.

See CREDITORS' DEED.

## FORMA PAUPERIS.

*Costs to Married Women.*]

See COSTS.

## FRAUD.

1. *Setting Aside Conveyance.*] S. was aware that R. was entitled to property, but might not at first be aware that the interest of R. was not precarious, and impressed R. with the notion that it was so; S. however became aware that the interest was not precarious, yet he did not inform R. of that fact, but on the contrary still represented that it was both precarious and could not be established without difficulty, delay, and expensive litigation. R. in such a state of circumstances sold one half of the estate to S., the latter giving him an indemnity against all costs of recovering the property, and representing that men of business conducted cases on the arrangement that no law expenses were paid unless the proceedings were successful; but if they were, that law costs were paid out of the money recovered, and the party co-

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ducting the proceedings and furnishing the information was allowed half what was recovered, to satisfy him for risk of paying law expenses. Subsequently R. agreed to sell the other half for a stated sum. R. filed a bill to set aside the conveyance and to have the contract for the sale of the second moiety declared void, but died before the hearing, and the suit was revived by his devisee and executrix. S. filed a cross bill for the specific performance of the sale of the second moiety. In the first suit the solicitor of S. was made a party, and was charged with a participation in the fraud. The court below set aside the conveyance, and as the contract for the sale of the second moiety was based on the former conveyance it declared the same void, and ordered S. to pay the costs, but dismissed the original suit as against the solicitor, without costs. The court also dismissed the bill for the performance, with costs. From this decree S. appealed:—

*Held*, that as R. did not know his rights when he executed the conveyance, nor when he signed the contract for the sale of the second moiety, and that as the former was based on fraud and misrepresentation, and as the latter depended on the former, both must fail, and the decree must be affirmed, with costs. *Reynell v. Sprye*, 74.

2. *Misrepresentations.*] Where a party has induced another to act on the faith of several representations made by him, any one of which has been made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made, or was the result of innocent error. *Ib.*

3. *What is a Material Representation.*] A representation that remuneration for professional services rendered, as above stated, was customary, being untrue, is a ground for setting aside a conveyance and contract founded on it. *Ib.*

4. *Champerty.*] Whether the agreement amounted to champerty, or savored of champerty, still as the parties were not in *pari delicto*, and as the vendor had no legal advice but that of the solicitor of the purchaser, who adhered more to the purchaser than to the vendor, and failed in his duty to the latter, the court considered that the vendor's suit ought not to fail, on the ground that he was a party to a contract against public policy or illegal. *Ib.*

5. *Mortgage.*] A's solicitor agreed with B, that 1,000*l.* of A's money should be advanced to B on a second mortgage of property already in mortgagee for 1,000*l.* A mortgage, dated the 16th February, 1842, was prepared accordingly, and executed by B, no money passing. As soon as A heard of the transaction he repudiated it, but agreed to advance 2,000*l.* on a transfer of the first mortgage and a further charge. This was carried out by a deed of transfer and further charge, dated the 28th February, 1842. The deed of the 16th February was not cancelled, but remained in the possession of A's solicitor. In 1844 the solicitor advised C to advance 1,000*l.* on a transfer of the security of the 16th February, 1842. C paid the money to the solicitor, who handed over to C the deed, with a memorandum, which he had fraudulently induced A to sign, undertaking to transfer the mortgage. The solicitor employed the money for his own purposes. In 1848, the solicitor, by fraud, induced A to execute to C a deed of transfer of the mortgage of the 16th February, 1842, and to sign a receipt for the 1,000*l.* This deed contained words sufficient to pass the legal estate, which A had in him by virtue of the deed of the 28th February, 1842:—

*Held*, that as A, by signing the memorandum of 1844, had enabled the solicitor to commit the fraud, the consequences of such fraud must, as between A and C, be borne by A; and that C was entitled to half the benefit of the security of the 28th February, 1842. *Hiorns v. Holton*, 596.

6. *Effect of Deed.*] *Quære*, whether the deed of 1848 passed the legal estate, when its only object was to transfer the benefit of a deed which did not pass, nor purport to pass, the legal estate? *Ib.*

7. *Costs of Plaintiff.*] *Held*, that A must pay all the costs of the suit instituted by C to obtain her rights, except the costs of the mortgagor and those of a defendant who ought not to have been made a party. *Ib.*

8. *Mortgagors' Costs.*] *Held*, also, that the mortgagor was to blame in not having taken care that the deed of the 16th February, 1842, was cancelled, and that he, therefore, must bear his own costs. *Ib.*

See AUCTION. RAILWAYS.



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## FRAUDULENT PREFERENCE.

See BANKRUPTCY.

## FRIENDS SOCIETY.

See BANKRUPTCY.

## HUSBAND AND WIFE.

1. *Legacy to Wife.*] A testator, by his will, gave to A, a married woman, an annuity for her life for her separate use, and by a codicil, gave to A, in addition to the legacy mentioned in his will, the sum of 300*l.* No legacy had been given to A by the will :—

*Held*, that A was entitled to the 300*l.* for her separate use. *Warwick v. Hawkins*, 174.

2. *Marriage Settlement—Separate Use—Laches.*] By a settlement, dated the 19th April, 1815, made on the marriage of Sir J. W. with Miss J. D., certain personal property, consisting of money in the funds and money out on mortgage, &c., (all belonging to the lady), were settled to the general appointment, by deed attested by two witnesses, of the lady herself, during the joint lives of herself and her husband, with his consent, and after his decease, to her general appointment; and, subject to this power, the trusts were for the lady for life, to her separate use, but without any restraint on anticipation; with remainders over. The marriage took place, and in the same year Sir J. W. made his will, bequeathing and devising all his property, real and personal, to his wife, lady W., and making her his sole executrix. The trustees of the settlement never acted in any way previous to the institution of this suit, and the funds were never transferred into their names, but continued standing in lady W.'s name. After the marriage, lady W., who resided with her husband, at a distance from London, executed several powers of attorney to enable her bankers in London to sell out various parts of the funds in settlement, which were sold out accordingly, and paid in to Sir J. W.'s name. The bank powers of attorney required to be executed with the same ceremonies as were required by the marriage settlement to be observed in executing the power of appointment there. Various sums of mortgage money, also in this settlement, were from time to time paid off, and the amounts paid in to his name, invested also in his name in the purchase of consols, and in this manner about 8,000*l.* worth of different stock was, in 1821, standing in the name of Sir J. W., and all checks for current expenses were drawn by Sir J. W., which, in accordance with Lady W.'s written request, were honored by her London bankers out of her separate account. On the other hand, Sir J. W. suffered a legacy of 2,000*l.* to be received, and placed to the separate account of his wife. In 1826, Sir J. W. purchased, at his wife's request, the estate of B., where he habitually resided with his wife. The purchase was taken in the name of Sir J. W. alone in fee. The tenure was customary freehold. Sir J. W. died in 1844, intestate, the will of 1815, not passing after purchased estate, and without an heir at law. On the present bill, brought after his decease by the personal representative of the last surviving trustee of the settlement of 1815, against those claiming under the lord of the fee by escheat, to establish a lien on the lands for the amount of the purchase-money, it was held :—

First, that there had been no such laches as to deprive the plaintiff of his right to sue; on the contrary, he was bound to sue. *Hughes v. Wells*, 389.

3. *Power.*] Secondly, that the power of appointment was not well exercised by lady W., in the powers of attorney, nor by the assignments of mortgage. *Ib.*
4. *Defective.*] Thirdly, that there was not a defective power of appointment which a court of equity would aid, so far as related to the moneys invested in land. *Ib.*
5. Fourthly, that there was a defective appointment which a court of equity would aid, so far as respected the sums of money expended by Sir J. W. and lady W., in keeping up their establishment, which was beyond their annual income. *Ib.*

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6. *Escheat*.] Fifthly, that the lands are subject to the lien of the trustee, to the above extent, in the hands of the lord claiming escheat. *Ib*.
7. *Parties*.] Lady W., surviving her husband, had formally exercised her power of appointment in favor of E., whom she also made her executrix. E. died, leaving B. her executor:—  
*Held*, sixthly, that B. was a necessary party to the suit. *Ib*.
8. *Husband's Bankruptcy—Wife's Equity to a Settlement*.] There is no rule of law or practice against this court decreeing the whole residus of a wife's fortune to be settled upon the wife and her children, but it is a matter purely in the discretion of the court; and in the present case, where the husband had received a large portion of his wife's fortune, and subsequently deserted her, the whole residue was decreed against the husband's assignees in bankruptcy, to be settled upon the wife and children, although by a post-nuptial settlement a considerable portion of the wife's fortune had been settled on the wife and children. *Dunkley v. Dunkley*, 318.
9. *Covenant to Live Separate*.] A husband entered into a covenant, in a deed of separation, that he would permit his wife to live separate from him, and would not molest her for so doing, nor visit her without her consent:—  
*Held*, that the court will restrain him from infringing such a covenant. *Sanders v. Rodway*, 463.
10. *When Joint Tenants*.] Testator bequeathed 700*l.* unto and amongst J. C. and C. his wife, and W. L.; and in a subsequent part of the will he bequeathed 200*l.* to the said W. L., and 200*l.* to the said J. C.; also 200*l.* to the said C., the wife of the said J. C.:—  
*Held*, that J. C. and C. his wife were entitled to one moiety only of the 700*l.* between them, and that the other moiety belonged to W. L. *Wyld's Estate, in re*, 491.

## See DOWER. MARRIAGE SETTLEMENT.

*Wife's Right to Costs*.]

See COSTS.

*Contract by Father to give Wife a Portion*.]

See CONTRACT.

## ILLEGITIMATE CHILDREN.

See WILL.

## INFANT.

1. *Income of*.] The court will not give a direct benefit out of an infant's income to his father. *Stables, in re*, 61.
2. *Allowance to Father*.] A scheme by which an infant (whose father was living) was to be articulated to a solicitor, and to live with an uncle residing in the same place, was approved of by the court; and the uncle was appointed to act in the nature of a guardian to the infant, and to have an allowance out of his income. An application that an allowance might be made to the father, who lived at a distance, and was in very narrow circumstances, was refused. *Ib*.
3. *May be a Deputy Steward*.] A surrender taken out of court of copyhold lands of a married woman, and requiring therefore her separate examination and consent, may be well taken by a deputy steward who is an infant. *Eddlestone v. Collins*, 331.

See TRUSTEE ACT.

## INFORMATION.

1. *Death of Relator*.] Where all the relators in an information are dead, it is irregular and improper to proceed without having a new relator or relators appointed, and the court will restrain all further proceedings in the suit until new relators, or a new relator, shall have been appointed. *Attorney-General v. Haberdashers' Co.*, 273.

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2. *Practice.*] An information had been filed previously to the year 1792. By the order on further directions, dated the 22d November, 1797, a receiver of the charity estates was appointed. From that time down to the 15th January, 1839, when the last order was made, divers receivers had from time to time been appointed under orders of the court, and various other proceedings had been taken in the suit, although the relators had long since been dead. All these orders and proceedings had been obtained and taken by the parties for the time being, the successors in business of the original solicitors for the information, who appeared in such proceedings for the charity and for the Attorney-General. Upon the petition of the Attorney-General, it was declared that the appearance of the solicitors on behalf of the Attorney-General and the charity, since the decease of the relators, was irregular and improper. *Ib.*

See PRACTICE.

## INJUNCTION.

1. *Misrepresentations.*] The court below having held that a party who, by representations, had induced another to enter into irrevocable engagements, must be restrained from taking proceedings to enforce obligations and promises, the abandonment of all intention to enforce which was the subject of those representations, the decree granting a perpetual injunction to restrain such proceedings was on appeal confirmed; Lord Justice Lord Cranworth dissenting, first, because this case was not within the principle of the cases on which the decree below was professed to be grounded, those cases depending on misrepresentation of fact, while here there was no misrepresentation of fact; and secondly, because the promise alleged by the plaintiff was supported by the evidence of one witness only (who had since died), and which was not, in his lordship's opinion, supported by the surrounding circumstances, and was positively denied by the answer. *Money v. Jorden*, 245.
2. *Negative Covenants.*] *Mdlle. J. W.* agreed in writing with *L.* that for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that, during her engagement with *L.* she would not sing elsewhere without his license in writing. Afterwards *J. W.* contracted with *G.* to sing and perform at his theatre during the period specified in her engagement with *L.* Upon bill by *L.* praying simply that *J. W.* might be restrained from singing and performing elsewhere than at his theatre during the period specified, the court granted an injunction accordingly. *Lumley v. Wagner*, 252.
3. *Jurisdiction.*] Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants. *Kemble v. Kean*, (6 Sim. 333,) and *Kimberley v. Jennings*, *Ibid.* 340; s. c. 5 Law J. Rep. (N. S.) Chanc. 115, disapproved of. *Ib.*
4. But in such cases the court will decline to interfere where the jurisdiction cannot be beneficially exercised, as in *Collins v. Plumb*, (16 Ves. 454,) or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot specifically perform. *Hills v. Croll*, 2 Phil. 60; s. c. 14 Law J. Rep. (N. S.) Chanc. 444. *Ib.*
5. *Dissolution of.*] The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him:—  
Held, upon motion by the defendant before answer, that the plaintiff must pay the amount for which judgment had been signed into court within a specified time, or the injunction must be dissolved. *Anderson v. Noble*, 45.
6. *Against Railroads.*] Where there is an agreement between two railway companies, which is beyond the powers of both, and against the policy of their acts of parliament, a shareholder in one of the companies may file a bill, on behalf of himself and all the other shareholders therein, against his own company and the other company, for an injunction to restrain the execution of the agreement, and without making either the directors of the former company, or the shareholders therein who pro-

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moted the agreement, or any of them, defendants to the suit. *Winch v. The Birkenhead, Lancashire & Cheshire Junction Railroad Co.*, 506.

See HUSBAND AND WIFE. RAILWAYS.

INSOLVENCY.

*Rights of Assignees — Notice.*] A person, being entitled to a reversionary interest in a trust-fund, became twice insolvent, but on neither occasion did he insert that property in his schedule, and the insolvent assignee did not give notice of the insolvency to the trustees of the fund other than by the general notice in the Gazette. Subsequently the insolvent assigned the reversionary interest to a purchaser, for value, without notice of the insolvency, who immediately gave notice of the assignment to the trustees of the fund:—

*Held*, affirming the decision of the court below, that the assignment to the insolvent assignee, under the 7 Geo. 4, c. 57, s. 11, had no greater effect than an assignment for value would have had; and that, as the insolvent assignee had not perfected his title by giving notice to the trustees, the title of the subsequent purchaser for value must prevail. *Atkinson's Trust*, in re, 459.

See MARRIAGE SETTLEMENT.

INSURANCE.

1. *Winding-up — Contributory.*] A subscribed the deed of settlement of a joint-stock company, instituted for the purpose of granting assurances on ships, for 1,000 shares of 25*l.* each. By the deed of settlement it was declared that a deposit of 2*l.* 2*s.* should be paid on each share, and that a further call of 2*l.* 2*s.* might be made by the directors, but that no further call should be made without a previous resolution of the shareholders assembled at a general meeting. The company granted several policies. The company was afterwards made bankrupt, under the 7 & 8 Vict. c. 111, and debts were proved against it to the amount of 70,000*l.*, and upwards. It was afterwards ordered to be wound up under the Joint-stock Companies Winding-up Act. The Master placed A on the list of contributories, and made an order that he should pay 25,000*l.* Motion, that the order as to the call should be discharged was refused. *Talbot, ex parte*, 205.

2. *Transfer of Policies.*] A sum of money was borrowed from an insurance company, and a bond was given to secure the repayment of the money. The borrower at the same time insured his life as a further security, and the bond extended to the payment of the premiums for keeping up the policy. The insurance company having ceased to carry on business, was dissolved, and the affairs being wound up, the company transferred, amongst other things, this bond and policy to another insurance company. No premiums were paid to the second company, and the policy was allowed to drop. The surety in the bond died, and the second insurance company claimed to be creditors against his estate for the amount of premiums unpaid, on the ground that the policies ought to be kept on foot until the money due upon the bond had been paid:—

*Held*, as regarded the premiums, that this was not such a contract as the assignees of the first insurance company could enforce, although they had a good claim against the estate of the surety, *quoad* the amount secured by the bond. *Atkinson v. Gylby*, 209.

INTEREST.

See TRUSTEES.

On Balances.]

See EXECUTOR.

On Purchase-Money.]

See PURCHASERS. VENDORS.

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## INVESTMENT.

See CHARITY. RAILWAYS.

## JOINT ESTATE.

See HUSBAND AND WIFE.

## JOINT EXECUTORS.

See EXECUTORS.

## JOINT-STOCK BANKING COMPANY.

See BANKING COMPANY.

## JOINT-STOCK COMPANY.

See WINDING-UP ACTS.

## JURISDICTION.

*Power of Sale.*] Where trustees, having a power of sale, disclaim, the court can exercise the discretion of the trustees, and sell if necessary. *Browne v. Paul*, 43.

## LANDS CLAUSES CONSOLIDATION ACT.

See RAILWAYS.

## LANDLORD AND TENANT.

*Change of Tenancy.*] A house being let to A, A died, leaving B and C her executors. B continued to pay the rent and it appeared to be the intention both of B and the landlord that B should be substituted in the tenancy; but C, the other executor, knew nothing of the intended change:—

*Held*, that such change was inchoate only, and not perfected; and therefore A's estate still continued liable on the lease. *McDonnell v. Pope*, 11.

See LEASE.

## LEASE.

*Construction of.*] "Occupation under a lease" means occupation of all that passed under the lease, whether in actual enjoyment and use or not, and whether known to exist at the time of the lease or not; and therefore a cellar under certain demised premises was held to be in the "occupation of the lessee under the lease," although the tenant of the neighboring tenement was in the actual use of such cellar:—

*Semle*, a claim ought to set forth such facts as are necessary to bring forward the real point at issue between the parties. *Whittington v. Corder*, 503.

See LANDLORD AND TENANT.

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## LEGACY.

*When vested.*] A testator devised real estate to A, in fee, charged with an annuity to B, for life, and directed that after the death of B, the estate should be charged with the payment of 100*l.* apiece to X, Y, and Z, and that the same should be paid to them respectively within six calendar months after the death of B, or such of them as should be then living. X died in the lifetime of B:—

*Held*, that the legacy to X had not vested, and was not payable to his representatives. *Goodman v. Drury*, 135.

## LETTERS.

See COMPROMISE.

## LEX LOCI

See CONFLICT OF LAWS.

## LIEN.

*By one of Several Executors.*] T. was appointed executor along with two others, and took also a beneficial interest in the estate. In 1844, a bill was filed for administration of the estate; in 1845, T. assigned certain leaseholds, in which he was beneficially interested to the extent of one third, to M., for securing his own debt. It turned out that at that time T. was also indebted to the estate:—

*Held*, that the other executors had a lien on the leaseholds so mortgaged in preference to M.; and a bill against M. to establish that lien, and to obtain the title-deeds, (which were in M.'s possession), was allowed, with costs against M. *Cole v. Muddle*, 26.

## LIMITATIONS.

See CREDITOR'S DEED. WINDING-UP ACTS.

## LUNACY.

*Allowance out of Estate.*] Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death; and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; the court allowed the executors of the husband to deduct all the money paid for keeping up the establishment, after the lunacy, till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committees. *Hewson, in re*, 197.

## LUNATIC.

1. *Liabilities of Committee.*] A sum of money having been lost to the estate of the lunatic under circumstances which the court considered to be the fault of the committee in not taking steps to enforce payment, the estate of the committee, who had died, was charged with the same. *Swindell, in re*, 159.
2. *Payment to survivor of Two Committees.*] Two committees of the estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place.

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The estate being small, the court permitted the income to be paid to the survivor on the production of an affidavit of his solvent circumstances. *Noble, in re*, 158.

3. *Funeral of—Expenses.*] A lunatic died without leaving ready money to pay the expenses of his funeral, and of whose person or of whose estate there was no committee. The heir at law who was one of the next of kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for such purpose; but the court directed the persons with whom the lunatic had resided to proceed with the funeral, and ordered the petition to stand over.  
A petition for this purpose is necessary; a warrant from the Lunatic Office is not sufficient. *Townsend, in re*, 157.
4. *Care of his person.*] Where, in the opinion of the court, it will be for the benefit of the lunatic that the care of the person should remain undisturbed, it will so direct, and will direct the whole of the income of the property to be paid to the lunatic, pending a petition to traverse; although the court will confirm the report of the Master in Lunacy, appointing a committee of the person and a committee of the estate. *Cumming, in re*, 161.
5. *Taxation of Solicitor's Bill.*] Solicitors who claimed costs for taking out the commission, and for other business in the lunacy, obtained an order for taxation, but did not tax. Five years after the order the lunatic died, leaving real estate, but no personal property. The solicitors sued the committees at law, but they set up the Statute of Limitations, and the action failed. The solicitors now presented a petition, praying an order for taxation, with a view to proceedings to make the real estate liable, and the court made the order, but without prejudice to any question whether the petitioners had any claim on the lunatic's estate. *Hart, in re*, 186.

## MARRIAGE CONTRACT.

See CONTRACT.

## MARRIAGE SETTLEMENT.

1. *Thelluson Act.*] By a marriage settlement, dated 1823, family estates at B. were charged with 40,000*l.*, portions for younger children of Lord B. The portions were to be divided, payable, &c., among the younger children, as Lord B. should by deed or will appoint; and in default of appointment, equally to be divided among them and payable at the decease of Lord B. There was a power of advancing the whole of the expectant portion of each child to him or her during the lifetime of Lord B., with his consent. By will, dated 1825, the great uncle of Lord B. bequeathed 15,000*l.* to trustees, upon trust to accumulate the same during the life of Lord B. or for such further period as should make up the space of twenty years, in order, by means of the accumulated fund, to exonerate the family estates at B. from the charge of 40,000*l.* This will in many other respects recognized the settlement, and showed a desire to leave the family estates at B. enlarged and unincumbered. The testator died in 1826. In 1847, when the period of twenty-one years after the testator's decease elapsed, the accumulated fund only amounted to 35,000*l.* At the time of instituting this suit it amounted to 43,000*l.* The period of twenty-one years, therefore, mentioned in the 1st section of the Thelluson Act, proved inadequate to effect the intention of the testator:—  
*Held*, first, that the trust for accumulation was not within the exception in the 2d section, as being a provision for payment of portions of children of persons taking an interest under such conveyance, devise, &c., and was valid, therefore, only for the period of twenty-one years from the time of the testator's decease. *Barrington v. Liddell*, 445.
2. *Accumulated Fund.*] Secondly, that no part of the accumulated fund could be applied at the time of the decree in payment of the portions, or of any part of the 40,000*l.* *Ib.*
3. *Income.*] Thirdly, that the income of the accumulated fund, accrued since the

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expiration of the twenty-one years was disposed of by the statute to the residuary legatees of the testator. *Ib.*

4. *Interest.*] *Semble*, the "interest" which the parent of the portioned child must be possessed of under the 2d section must be an interest in the same property, real or personal estate, the income of which is directed to be accumulated. *Ib.*
5. *Construction.*] *Semble*, the word "such" in the expression "such conveyance, settlement, or devise," in the same 2d section, refers to the object or nature of the instrument, not to the instrument itself. *Ib.*
6. *Semble*, the exception as to accumulation for payment of debts refers only to the debts of the person directing the accumulation. *Ib.*
7. *Power not authorizing Exclusive Appointment.*] By a marriage settlement, real estates of the intended wife were conveyed to trustees in fee, upon trust, after the marriage, to pay the rents to the husband for life, and then to the wife for life, and after the death of the survivor, to pay the rents towards the maintenance of "all and every the child or children" of the marriage, "until such child or children" attained twenty-one; "and when and as such child or children respectively" attained twenty-one, "to convey the same premises unto such child or children, in such manner, shares, and proportions, and for such use, estate, and estates," as the husband and wife jointly, or as the survivor of them alone, should appoint; and in default thereof, "to convey all the same premises, with the appurtenances, unto and amongst such children equally, share and share alike, to hold as tenants in common, and not as joint tenants: and if there should be but one such child who should live to attain the age of twenty-one years, then upon trust to release and convey all the same premises, with the appurtenances, unto such only child, and his or her heirs forever;" if no issue, or all such issue should die without issue in the lifetime of the parents, there was a gift over:—*Held*, that the power did not authorize an exclusive appointment to some only of the children. *Strutt v. Braithwaite*, 381.
8. *Held*, also, that, under the gift in default of appointment, all the children of the marriage were entitled to vested interests on their respective births. *Ib.*
9. *Held*, further, that the children took estates in fee simple under the gift in default of appointment. *Ib.*
10. *Trader—Bankrupt Law*] A trader about to be married, and being, in fact, insolvent, of which insolvency the intended wife was ignorant, entered into a covenant with trustees to pay them a moderate sum of money, the interest to be paid to the wife's appointment, and, in default, to the intended wife for life for her separate use, then to the husband for life, and the capital to be in trust for the survivor absolutely. Property of the wife was also agreed to be settled upon the same trusts. The husband became bankrupt, and the trustees applied to prove for the amount, which had never been paid, but the commissioner rejected the proof:—*Held*, on appeal, that the settlement was good as against the assignees, and that the trustees were entitled to prove. *Mac Birnie, in re*, 479.

See TRUSTEE.

## MASTER.

*Jurisdiction of.*]

See WINDING-UP ACTS.

## MISJOINDER.

*Objection should be taken before Hearing.*] The original mortgagee in fee of a certain real estate died intestate, and his heiress and administratrix devised all estates vested in her by way of mortgage to two trustees, and appointed them executors. By a codicil she appointed P. to be a trustee and executor jointly with the two others. These two renounced and disclaimed, and P. alone proved, and he and his wife, who was the heiress of the testatrix and of the original mortgagee, filed a bill to foreclose as co-plaintiffs. An objection taken at the hearing for misjoinder of Mrs. P. was



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overruled, though she had no interest, as she was not an improper party to join in a reconveyance, to make assurance doubly sure. *Pearce v. Watkins*, 370.

## MISTAKE.

See FRAUD.

## MISREPRESENTATIONS.

See FRAUD.

## MONEYS.

*Meaning of — in a Will.*]

See WILL.

## MORTGAGE.

1. *Devise of.*] A testator, a mortgagee in fee of real estate, gave and bequeathed to A all his moneys, securities for money, and all his goods, chattels, personal estate and effects whatsoever and wheresoever, to hold to A, his executors, administrators and assigns, he paying thereout all his debts: —

*Held*, that the legal estate in the mortgaged property passed to A. *King's Estate*, in re, 128, and see *Walker's Estate*, in re, 130.

2. *Conflict of Laws — Sale of Lands.*] By the law of Demarara, lands cannot be mortgaged unless the intention to execute the mortgage be advertised in the Gazette, and the mortgage must be taken before a judge of the Superior Court. Any general creditor may, by an entry on the Rolls, prevent such mortgage from being taken. M., in 1845, contracted for the purchase from G. of certain lands in Demarara. In 1846, M. executed in England, in the usual English form, a mortgage of the lands to W., for securing the balance of the purchase-money advanced for M. by W. None of the preliminaries required by the law of Demarara had been previously observed. Then G. conveyed the lands to M., but by an accidental informality some parcels were omitted. Then M. became bankrupt. By the law of Demarara, a bankrupt's assignees have full and sole power to sell all his real estate. The assignees entered, and sold all the lands accordingly, both those which had been formally conveyed to M. and those parcels which, by accident, had not been conveyed: —

*Held*, first, that the *lex loci rei sitæ* must govern the application of the proceeds of the sale of the estate, just as much as of the estate itself. *Waterhouse v. Stansfeld*, 465.

3. Secondly, that there was no difference between the lands formally conveyed to M. and the lands accidentally omitted to be conveyed. *Ib.*
4. Thirdly, when the law of a foreign country places a restraint upon the alienation of property, a contract here respecting that property cannot be enforced against the foreign law. *Ib.*
5. *Creditors' Suit.*] A legal mortgagee may maintain a creditor's suit. *Groves v. Lane*, 376.
6. In such a suit an administrator *ad litem* of the deceased mortgagor does not sufficiently represent him. *Ib.*
7. The case stated on a claim must be such as would not render a bill demurrable if stated on a bill. *Ib.*
8. Amendment of defective claim allowed on payment of the costs of the day. *Ib.*

See FRAUD. PLEDGE.

*By an Executor.*]

See EXECUTOR.

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## NEGATIVE COVENANT.

See HUSBAND AND WIFE.

## NEXT FRIEND.

See PRACTICE.

## NOTICE.

See INSOLVENCY.

*Of Insolvency.]*

See CORPORATION. VOLUNTARY SETTLEMENT.

## OFFICIAL MANAGER.

See RAILWAYS.

## ONUS PROBANDI

See EXECUTORS.

## PARENT AND CHILD.

See INFANT.

## PARTIES.

See EXECUTORS. HUSBAND AND WIFE. MISJOINDER.

## PARTITION.

A suit was instituted by bill for the partition of real estate. Before this suit was brought to a hearing, a claim was filed for the partition of a portion of the same property, the plaintiff in the claim being interested in that portion only. The court made a decree on the claim, declining to postpone the claim until the hearing of the suit. *Brace v. Foulkes*, 297.

## PARTNERSHIP.

*Bankruptcy — Receiver.]* When one of two partners has become bankrupt in respect of his separate estate, and an official assignee and creditors' assignees have been appointed, and the partnership had been dissolved by the bankruptcy, the continuing partner is entitled to have a receiver of the partnership debts appointed in chancery, notwithstanding the 152d section of the Stat. 12 & 13 Vict. c. 106. *Freeland v. Stansfield*, 336.

See BANKING COMPANY.

## PETITION.

See LUNATIC.

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## PLEADING.

See RAILWAYS.

## PLEDGE.

1. *Bq Consignee.*] The plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him as an advance, upon account of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods to recoup himself the bills drawn upon him by the Liverpool merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be decreed to pay him the amount produced by the sale of the pearls:—  
*Held*, affirming the decree of the court below, that the pledge was valid within the 5 & 6 Vict. c. 39, as made *bonâ fide* and in the ordinary course of business. *Navulshaw v. Brownrigg*, 261.
2. *Notice.*] Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; *secus*, if the pledgee had notice that the consignee was prohibited from pledging. *Id.*

## PORTION.

*Promise to give to a Child.*]

See CONTRACT.

## POWER.

*Execution of.*] By a marriage settlement, power was given to the wife, if the husband survived her, to dispose by will, immediately, of 3,000*l.*, part of certain funds; and, after the husband's death, of the residue of the funds. Powers were also given to her to dispose by will of certain household furniture; and there was a covenant by the husband that she should have power to dispose by will of certain shares, of her jewels, and of her savings. She died in her husband's lifetime. By her will, expressed to be by virtue of the power and authority of the settlement, after reciting that she had power to dispose of 3,000*l.*, she gave certain legacies and annuities. She then disposed of her savings. She then disposed of the shares and of certain jewels, and then gave the household furniture. She then directed, appointed, gave, and bequeathed all the rest, residue, and remainder of her moneys, and other her personal estate, after payment of debts and funeral expenses, to certain persons:—  
*Held*, that the will operated as an execution of her power as to the residue of the funds. *Harvey v. Stracey*, 13.

See HUSBAND AND WIFE. MARRIAGE SETTLEMENT. SPECIFIC PERFORMANCE. WILL.

## POWER OF SALE.

See SPECIFIC PERFORMANCE.

## PRACTICE.

1. *Supplemental Claim.*] A claim had been filed for the appointment of new trustees. It was afterwards discovered that parties not named in the claim were necessary, and before the matter was completed some of the parties died, and it became necessary

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- to bring their representatives before the court. Leave was given to file a supplemental claim, and bring the necessary parties before the court. *Gray v. Rusbridger*, 10.
2. *Costs—Stay of Proceedings.*] A party was ordered to pay the general costs of certain suits. Pending an appeal, he moved for leave to file a supplemental bill in the nature of a bill of review, and obtained leave to do so on depositing 50*l.* with the registrar, and he was ordered to pay the costs of the motion. He paid the 50*l.*, but not the costs of the motion, and filed a supplemental bill; but the court held that the payment of the costs of the motion was a condition annexed to the order giving leave to file the supplemental bill, and that therefore all proceedings in the supplemental suit must be stayed until payment of them. *Sprye v. Reynell*, 115.
  3. *Waiver.*] Where a party is ordered to pay the general costs of a suit, and also the costs of a particular motion, and then files a bill against the party entitled to all those costs, if the latter moves to stay all proceedings in the new suit until the costs of the particular motion are paid, that is a waiver of any right he may have to stay proceedings until the general costs of the suit are paid, and the court will only stay the proceedings until payment of the costs of the particular motion. *Ib.*
  4. *Supplemental Order.*] Order made on a petition by a rector for the investment of the money arising from the sale to a railway company of a part of the rectory lands. Pending the proceedings in the Master's office the rector died. The new rector consenting that the proceedings should go on, no supplemental order necessary — *semble*. *Rector of Lea, ex parte*, 167.
  5. *Motion by next Friend.*] In a suit by adult plaintiffs and infant plaintiffs, an order was obtained for changing the next friends of the infants. The order was drawn up and entered. The adult plaintiffs obtained at the Rolls an order for changing the solicitor to the suit, and alleged that the order appointing a new next friend had not been drawn up and entered. The new next friend moved to discharge the order obtained at the Rolls:—  
*Held*, that the order for changing the solicitor was irregular; but that the motion to discharge ought to have been by the infants by their next friend, and not by the next friend in his individual capacity. Application refused, but leave given to amend notice of motion. *Pidduck v. Boulbee*, 170.
  6. *Charity—Information.*] A claim to participate in charity funds, which had been appropriated for 240 years to certain parishes, ought to be brought before the court by information and not by petition, under Sir Samuel Romilly's Act (52 Geo. 3, c. 101). *Magdalen's Land Charity, in re*, 235.
  7. *Stay of Suits.*] Where there are two suits for the administration of the same estate filed in different branches of the court, and a decree has been obtained in one suit, in order to stay proceedings in the other suit, application should be made in the suit in which the decree has been obtained. *Ladbroke v. Bleden*, 371.
  8. *Revivor.*] Where the plaintiff in a creditor's suit dies, the suit may be revived by the executrix of the plaintiff, by application to registrar, as in motions of course. *Bonfil v. Purchas*, 429.
  9. *Deceased Defendant.*] After order in an administration claim, dated April, 1852, one of the executors, defendants, who was also residuary legatee, died insolvent, never having proved nor possessed assets. His widow refused to take out administration, and his children could not be found. An order was made, under section 44, on application *ex parte*, that the suit should proceed without making the representative of the deceased executor a party, and that the inquiries before the Master should proceed as though such representative had been served with a writ of summons. *Rogers v. Jones*, 437.
  10. *Stat. 15 & 16 Vict. c. 86, s. 52.*] Leave given that a creditor, so found by the Master, not a party to the suit for administration, might serve notice of motion for an order to revive, under sect. 52. *Lowes v. Lowes*, 438.
  11. *Semble*, such notice was necessary for the analogous motion under the old practice, and is still necessary. *Ib.*

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12. The 52d section applies to abatements which occurred before the act came into operation. *Ib.*
13. *Evidence.*] Where a cause was at issue before the passing of the 15 & 16 Vict. c. 86, upon motion by the plaintiff, with notice, the court ordered that the evidence should be taken under the provisions of that act and the orders of August, 1852, upon being satisfied that it was a case in which *visâ voce* evidence would be best, and that the defendant had been at one time ready to consent to its being taken under the act, although the defendant opposed. *Cable v. Cooper*, 439.
14. *Production of Documents.*] Under the new act, applications for the production of documents should be made at chambers. *Thornton v. Tenlow*, 455.
15. 15 & 16 Vict. c. 86.] The 52d section of 15 & 16 Vict. c. 86, only applies to the usual supplemental decree, and not to the case of a creditor, not a party to the suit, applying on notice, served with leave upon all parties, for an order that the suit might be revived, and the proceedings carried on by the creditor.  
Leave to file a supplemental bill refused on this motion. *Lowes v. Lowes*, 458.
16. *Absent Defendant—Service of Motion.*] Where the defendant is out of the jurisdiction, and his solicitor had absconded, service of notice of motion at the solicitor's address for service held sufficient, though the place mentioned in such address was now untenanted. *Newton v. Thomson*, 469.
17. *Master in Chancery—Abolition Act.*] The court will, in a proper case, adjourn the proceedings to chambers for a limited time, to examine the evidence and Master's report, with the assistance of the chief clerk, but not for the case to be gone into before the chief clerk as a judge. *Saunders v. Walter*, 469.
18. *Directing action at Law.*] A claim having been brought against an estate in the course of administration in a suit, and the legal rights of the parties not appearing to the court clear and beyond all reasonable doubt, and there being also a question as to the amount of damage, the court refused to decide the question, giving leave to the claimant to bring an action at law to establish his rights. *Vigurs v. Vigurs*, 471.
19. *Pro Confesso.*] Though an issue may sometimes be taken *pro confesso*, it is not the practice to order that an action directed by the court to be brought and tried at the next assizes, and not so tried, should be taken as tried. *Bradbury v. The Manchester, Sheffield, &c. Railway Co.*, 477.
20. *Order to try the Action.*] Where it was by the fault of both plaintiff and defendants that the trial did not take place, a motion by the defendants, that an action ordered to be brought and tried by the plaintiff should be taken as tried, and a verdict found for the defendants, and that the defendants should be discharged from their conditional undertaking, was refused, and the plaintiff was peremptorily ordered to try the action at the next assizes. *Ib.*
21. *Evidence under 15 & 16 Vict. c. 86.*] Cause ordered to stand over till a day named, to enable the plaintiff to prove that a defendant was out of the jurisdiction, which the other defendants objected was not sufficiently proved by the plaintiff's affidavit. *Smith v. Edwards*, 519.
22. *Supplemental Amendment.*] The court will not, on petition of a defendant, direct the plaintiff to enter upon record a statement of supplemental matters. *Langdale v. Gill*, 520.
23. 15 & 16 Vict. c. 86.] Where a written copy of a bill has been duly stamped and filed under the 6th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, the printed copy, if brought into the office within the fourteen days prescribed by that section, may be filed without having a stamp affixed. *Jones v. Batten*, 520.
24. *Administrator.*] In a creditor's suit, an administrator *ad litem* of the intestate creditor does not sufficiently represent him. *Groves v. Lane*, 529.
25. The act empowering the court to proceed in the absence of a personal representative does not apply to such a case. *Ib.*

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26. *Petitions.*] Petitions under the Trustee Relief Act should state the affidavit on which the trustees paid the fund into court. *Levett's Trusts, in re*, 532.

*Alteration of order by Amendment.*]

See *Windsor v. Cross*, 470.

*Charging order for Costs.*]

See *Westby v. Westby*, 414.

See COMMISSION. CORPORATION. INFORMATION. INJUNCTION. RAILWAYS.  
*Kemp v. Latter*, 324. *Maude v. Maude*, 402. *Mildmay v. Methuen*, 430. •

PROVISIONAL COMMITTEE.

See WINDING-UP ACTS.

PUBLICATION.

*When not Notice.*]

See INSOLVENCY.

PUFFING.

See AUCTION.

RAILWAYS.

1. *Pleading—Bill by one on behalf of Several.*] A bill was filed in December, 1846, by W., a subscriber to an abortive Railway Company, (which never had complied with the Standing Orders,) on behalf of himself and all other scripholders and shareholders except the defendants, against the defendants, (the promoters, directors, and secretary,) alleging, among other frauds, a fraudulent issue of spurious shares, upon which no deposit had been paid, but in respect of which a repayment of a pretended deposit was made; and praying, among other things, that all such fraudulent payments might be made good by those charged with the fraud. W. was a subscriber for forty shares, had paid 2*l.* 2*s.* per share deposit, and had placed his scrip shares in the hands of the secretary (a defendant to the bill) as a security for advances made by the secretary to him. In May, 1846, it was resolved to wind up; half the deposit of 2*l.* 2*s.* was repaid, and thereupon the original scrip certificates were delivered up to be cancelled, and new certificates issued; and subsequently a further return of 2*s.* 2*d.* per share was made to the scripholders, on which occasion these new certificates were called in, and the scripholders signed a memorandum engaging to release the promoters. Afterwards, however, the bill was filed, and in the course of the suit an official manager was appointed. In July, 1849, an order was obtained for the official manager to carry on the suit in the place of W.:—

*Held*, first, that W. could not have maintained a suit if he had still continued the nominal plaintiff. *Grand Trunk &c. Railway Co. v. Brodie*, 1.

2. *Official Manager.*] Secondly, that the official manager was not in a better position to maintain the suit than W.; the original plaintiff; in adopting the suit, the official manager took it with all its infirmities. *Id.*

3. *Costs.*] Thirdly, that the suit being improperly constituted in its inception, and the evidence not justifying the institution of the suit on the merits, the bill ought to be dismissed with costs, to be paid by the official manager, without prejudice to the question how far he was entitled to have those costs made good to him out of the assets of the company; and bill dismissed accordingly, with costs to be paid by the official manager. *Id.*

4. *Lands Clauses Consolidation Act.*] The 92*d* section of the Lands Clauses Consolidation Act, 1845, which enacts that the owners of a manufactory, part of which is

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- required by a railway company, shall not be called upon to sell part only of the manufactory, in case they are willing and able to sell the whole, is not imperative, but gives the owners, on being served with notice to take a part by the company, an option to require them to purchase the whole or part only of the manufactory, as they shall think best. *Sparrow v. Oxford &c. Railway Co.*, 33.
5. *Right to take Part of Land.*] Therefore, where the special act of a railway company, after incorporating therein the provisions of the general act, so far as they were not inconsistent with the provisions thereafter contained, went on to enact clauses relating to certain manufactories through which the railway was to pass, and part only of which would be required by the company, which clauses would be superfluous or inconsistent if it were imperative upon the owners to sell, and upon the company to purchase, the whole of the manufactories, it was held that these clauses were not inconsistent with the incorporation of the 92d section of the general act into the special act; and therefore that the company, if they gave notice to take part of any one of the manufactories, were compellable to take the whole, or only the part comprised in the notice, at the option of the owners. *Id.*
6. *Railway Act — Investment — Vicarage.*] Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct; and praying for a conveyance and payment of the money out of court, without a reference to the Master — the court made the order. *The Vicar of East Dereham*, 131.
7. *Trustee Act, 1850 — Costs.*] A petition, under the Trustee Act, 1850, stated that A had mortgaged lands to B, in fee; that B had died, having by his will devised the lands to infants, and appointed C his executor; that a contract had been entered into by C with a railway company for the sale of a part of the lands at a certain price, and that, for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C, and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs: —  
*Held*, that the court had no jurisdiction to make any order either in favor of or against the company. *Rees' Devisees, in re*, 137.
8. *Persons under Disabilities.*] Where money has been paid into court in respect of lands taken by a company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l.* the court will allow it to be paid to the tenant for life, but not otherwise. *Bateman's Estate, in re*, 138.
9. *Injunction against.*] A local railway act enacted that the whole of certain ground in a seaport town, conveyed to the company, should be used solely for the purposes of the railway and the buildings connected therewith, except for coke ovens or any purposes (other than the necessary purposes of the railway), which might cause nuisance or damage to the vendors' other property: —  
*Held*, not to restrain the company from allowing part of the building to be used as the custom-house, for passing the luggage of passengers and travellers and other custom-house duties. *Warden v. South Eastern Railway Co.*, 240.
10. Whether part of the buildings could be used as sleeping-rooms in connection with an hotel built by the company on the adjoining ground — *quære*.
11. *Agreement between.*] By an agreement between the G. N. Railway Company and the A. Railway Company, the G. N. company were, first, to bear harmless the A. company against all their guaranties to canals, or otherwise; secondly, the G. N. company were, until an act of parliament could be obtained, to work the traffic of the A. company, and to pay them such tolls as should, after answering the expenses and liabilities of the A. company, pay a dividend of 4*l.* per cent. on the paid up capital of the A. company, and after obtaining the act of parliament the G. N. company were to guarantee 4*l.* per cent. to the A. shareholders; and, thirdly, the G. N. company were, in the next session of parliament, to apply, at their own costs, for an act of parliament to ratify this agreement, and to keep on renewing such application if unsuccessful, always at their own expense. The Railways Clauses Consolidation

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Act, 1845, was embodied in the acts of the G. N. and A. companies. On a bill by two shareholders of the G. N. company to restrain their directors from carrying out this agreement, or from defraying out of the funds of the company the costs of such applications :—

*Held*, that the arrangement was not within the purview of the Railways Clauses Consolidation Act, 1845, s. 87, and that payments mentioned in the agreement were not “tolls” within the meaning of that section. *Simpson v. Denison*, 359.

12. *Tolls.*] *Quære*, what is a toll, and how ought tolls to be reserved within that section?

*Semble*, a toll is a payment for the right of passing along a highway, public or private; it is a payment connected with the passing over, and should probably be reserved, with reference to the number of carriages passing over the line. *Ib.*

13. *Distribution of Dividends.*] Shares in a company for making a foreign railway, not registered provisionally or otherwise, were allotted, and were treated by many of the allottees as transferable, and were sold by them. Scrip was afterwards issued to the holders of shares, whether they were the original allottees or not. Much of the scrip was afterwards sold and transferred by the holders. In winding up the company all the scrip was accounted for, except the scrip for about five per cent. of the shares allotted. Under certain terms of compromise, approved by the Master, a certain quantity of scrip was delivered up to be cancelled. The Master declared a dividend of 15s. per share on the shares allotted and paid upon, and not cancelled; and on the application of the official manager, it was ordered that he should distribute this and all future dividends among the scripholders for the time being, with the approbation of the Master, on the ground that the transfer of shares was the equitable transfer of a mere right to recover back the deposit on a total failure of the scheme, and notwithstanding that the scripholders were not all contributories. *Madrid & Valencia Railway Co., in re*, 354.

14. *Illegal Agreement.*] An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them, nor accepted by the other company, without the authority of parliament, and equity will grant an injunction to prevent the performance of such an agreement. *Winch v. The Birkenhead, Lancashire, &c. Railway Co.*, 506.

15. *Liability of Company.*] Though a railway company are not bound to be carriers on their own railway, they are bound to work the line; and the 87th section of the Railways Clauses Consolidation Act does not authorize one company to do more than carry part of their traffic, where that is necessary, upon the line of another company. *Ib.*

16. *Innocent Agreement.*] An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement. *Ib.*

17. *Injunction.*] Where there is an agreement between two railway companies, which is beyond the powers of both, and against the policy of their acts of parliament, a shareholder in one of the companies may file a bill, on behalf of himself and all the other shareholders therein, against his own company, and the other company, for an injunction to restrain the execution of the agreement, and without making either the directors of the former company, or the shareholders therein who promoted the agreement, or any of them, defendants to the suit. *Ib.*

See COSTS.

## RAILWAY STOCK.

See BANKRUPTCY.



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## REAL ESTATE.

1. *Money paid into Court.*] Money paid into court for land taken under the compulsory powers of an act of parliament, for public purposes, during the life of a tenant for life, who, by the failure of intermediate limitations, became tenant in fee simple, passed as real estate to her heir. *Horner's Estate, in re, 531.*
2. *Purchase-money of Land.*] Where the purchase-money of land taken under the compulsory powers of an act of parliament, for public purposes, is paid into court, subject to be reinvested in the purchase of land, free of expense to the parties beneficially interested, on their petition, it is impressed with real uses, and is *prima facie* to be treated as real estate. *Stewart's Estate, in re, 533.*
3. *Election.*] If the person absolutely entitled to the money-land have a right to elect to take it as personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeathes personal estate only, and does not devise realty, are not such proof of election as to prevent the fund descending, on his death, to his heir. *Ib.*

See CHARITY.

## RECEIPT.

See EVIDENCE.

## RECEIVER.

See BANKING COMPANY. PARTNERSHIP.

## RELATOR.

*Death of.*]

See INFORMATION.

## RELEASE.

See CREDITOR'S DEED.

## RENT.

See LANDLORD AND TENANT.

## RESIDUARY BEQUEST.

See WILL.

## REVIEW.

See PRACTICE.

## REVOCATION.

See WILL.

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SECURITIES FOR MONEY.

*Meaning of in a Will.]*

See MORTGAGE.

SEPARATE ACCOUNT.

See BANKING COMPANY.

SERVICE.

See CORPORATION.

SETTLEMENT.

See HUSBAND AND WIFE. WILL.

SOLICITOR.

See COSTS.

*When liable for Costs.]*

See FRAUD.

SOLICITORS' BILL.

See LUXATIC.

SPECIFIC BEQUEST.

See WILL.

SPECIFIC PERFORMANCE.

1. *Misdescription.*] Where copyhold premises had been let on lease in 1793, and rent had been paid and the possession gone up to the time of the sale, according to the terms of the lease, it is not such a misdescription as will induce the court to refuse to enforce an agreement, if the premises be described as subject to a lease containing the usual covenants, although the original lease had been lost, and there was no evidence to show who was now liable under the covenants. *Flint v. Woodin*, 278.

2. *Trustees — Power of Sale — Costs.*] A trustee having power to sell land in order to raise 600*l.* and the expenses, put it up to sale in two lots, and sold the first for 600*l.*, and the second for 510*l.* The second lot consisted of more than three acres of land, and was described in the particulars of sale as readily convertible into building ground:—

*Held*, that the sale of the second lot was not improper, and that the purchasers must pay the costs of a suit for specific performance brought against them by the trustee. *Thomas v. Townsend*, 294.

3. *Misdescription.*] At the Auction Mart, in London, the defendant purchased a house at Brighton, simply described as "Lot 1, No. 39 Regency-square." He afterwards discovered that the house was not actually in the square, but in a side street communicating with the square, but it was always named 39, Regency-square:—

*Held*, that there was no misdescription; and specific performance was decreed against the purchaser. *White v. Bradshaw*, 296.

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4. *Power — Execution of*] Lands were settled to such uses as A, and B, should, by a joint deed, executed in the presence of witnesses, appoint; and in default of appointment, to use in strict settlement, A, and B, being the first tenants for life in succession. In 1845, the S. W. Railway Company contracted with A, and B, for the sale of land, but the price was not fixed. In 1846, the company advanced part of the consideration money to them, on their joint receipt, in which it was stated that the money was "in respect of the lands, part of our estates, required for the purposes of the S. W. Railway Company." Before any formal exercise of their joint power by A, and B, A died. Afterwards other parts of the settled lands were contracted to be sold to the company:—  
*Held*, first, that this was not such a contract as could be enforced against B. *Morgan v. Milman*, 312.
5. *Receipt.*] Secondly, that the receipt was not such a defective execution of the power as would be aided in equity. *Ib.*
6. *Revocation.*] A purchase was to be completed on the 25th October. Before that time the purchaser gave notice, that unless the title was completed by the 5th November, he would abandon his contract. The title was not completed till the 8th January following, and the purchaser accordingly revoked the contract. Specific performance nevertheless decreed against him. *Parkin v. Thorold*, 416.
7. *Doubtful Power.*] A testator gave and devised the residue of his real and personal estate to A, B, and C, their heirs, executors, and administrators, upon certain trusts, and empowered his said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell. The surviving trustee devised the trust estate, and his devisees contracted to sell it:—  
*Held*, that there was so much doubt about their having the power to sell, that the court would not compel the purchaser to perform the contract. *Wilson v. Bennett*, 431.
8. *Authority of Agent.*] Where the authority of the agent of the vendor was not sufficiently shown, a specific performance at the suit of the purchaser was refused, but under the circumstances, without costs. *Wilkinson v. Stringer*, 500.

See FRAUD. WILL.

## STAMP.

See EVIDENCE.

## STATUTES CITED, EXPOUNDED, &amp;c.

4 Geo. 4, c. 83 . . . . .	262
6 Geo. 4, c. 94 . . . . .	262
7 Geo. 4, c. 57, s. 11 . . . . .	459
5 & 6 Vict. c. 39 . . . . .	263
8 & 9 Vict. c. 20, s. 87 . . . . .	364
10 & 11 Vict. c. 96 . . . . .	372
11 & 12 Vict. c. 45, s. 53 . . . . .	21
12 & 13 Vict. c. 106, s. 152 . . . . .	336
12 & 13 Vict. c. 108 . . . . .	284
13 & 14 Vict. c. 60 . . . . .	372
15 & 16 Vict. c. 80, s. 42 . . . . .	431
15 & 16 Vict. c. 86, s. 39 . . . . .	500
15 & 16 Vict. c. 86, s. 44 . . . . .	437
15 & 16 Vict. c. 86, s. 52 . . . . .	458

## STAY.

*Of Proceedings.*]

See INJUNCTION.

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STAYING SUITS.

See PRACTICE.

STEWARD.

See INFANT.

SUPPLEMENTAL CLAIM.

See PRACTICE.

SURRENDER.

*Of Copyhold, to an infant Steward.]*  
See INFANT.

SURVIVORSHIP.

See WILL.

TOLLS.

See RAILWAYS.

TRADER.

See MARRIAGE SETTLEMENT.

TRUST.

*Annuity — Charge on the Corpus.]* A testator devised real estate to B, charged with an annuity to A, for her life, with powers of distress and entry. The rents fell short of the annuity, and an arrear became due to A. A sum of money (less than the arrear) was paid into court by a railway company in respect of a part of the estate which had been taken by them:—

*Held*, that A was entitled to this sum in respect of her arrears. *Tinkler's Trust, in re*, 127.

*Intention to Create.]*

See WILL.

TRUSTEES.

1. *Liability of— Costs.]* A trustee of a marriage settlement, who allowed a sum of £50l. to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5l. per cent. interest:—

*Held*, liable to account, with annual rests, and also to the costs of the suit. *Jones v. Foxall*, 140.

2. *Vesting Order.]* In cases where new trustees are appointed under the Trustee Act, 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn v. Langhorn*, 216.

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3. *Costs.*] A trustee for a company, having borrowed money for its purposes on his own bond, and the money being afterwards recovered from him in an action by the bond creditor, which the company, in spite of due notice, left him to defend, claimed this money as a debt in the Master's office, on the winding-up of the company. The Master disallowed the claim, because he thought there was no authority in the trustee to borrow money for the company. On appeal, an action was directed to try the question of the right to borrow, which was decided in favor of the trustee:—  
*Held*, that he was entitled to claim the bond debt, and the costs, charges, and expenses of defending the action and costs in the Master's office, and of the present motion. *Croxton, ex parte*, 402.

## See EXECUTORS. SPECIFIC PERFORMANCE.

## TRUSTEE ACT—1850.

1. *Infant Trustee Abroad.*] An infant trustee of stock in the jurisdiction not being within the Trustee Act of 1850, an infant sole trustee of stock out of the jurisdiction, is not a sole trustee of stock out of the jurisdiction within the meaning of the 22d section. *Cramer v. Cramer*, 366.
2. *Constructive Trust—Vesting Order.*] A, the owner of shares in a certain bank, wrote a letter from Calcutta to the manager in England, requesting him to deliver over the shares to the manager of another bank, to which A was indebted, and to pay all dividends on the shares to, and to sell them at, the order of, this last-mentioned bank. A being still in India, the shares were sold under the authority of this letter, and the purchaser applied for an order under the above act to vest the shares and dividends in B, for the purpose of enabling the purchaser to obtain a transfer of the said shares and dividends from B, under the authority of the act. On proof of the signature of A to the letter of the sale, and that the debt had ever since existed and was still due, the order was made. *Major Angelo, in re*, 367.
3. *Foreign Trustees.*] By a deed-poll declaring the trusts of certain sums of stock, power was reserved to the trustees to invest the trust moneys in the French funds. The trustees, although applied to by the tenant for life to make such investments, refused to do so, and paid the trust funds into court under the Trustee Relief Act. Upon a petition presented by the tenant for life, praying for the appointment of three foreigners resident in Paris, as trustees in the room of the old ones, and the transfer of the trust funds to them accordingly, the court refused to make the order. *The Trust Estate of Guibert, in re*, 372.
4. *New Trustee.*] The court has no jurisdiction, under the Trustee Act, 1850, to appoint a new trustee of a term of which there is no subsisting trustee. *Hazeldine, in re*, 375.
5. *Costs.*] Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4l. per cent., might form a charge on the inheritance. *Davies, in re*, 380.
6. *New Trustees.*] New trustees under the Trustee Act, 1850, will not be appointed except upon their written consent. *Battersby's Trust, in re*, 389.
7. *Constructive Trusts.*] Sale under decree for sale, for the purpose of paying costs of certain real estate, to which infants were beneficially entitled in case they survived their mother and attained twenty-one:—  
*Held*, that the infants were not constructive trustees, and that a vesting order in favor of the purchaser could not be made under the above act. *Weston v. Filer*, 473.

*Jurisdiction of Court.*]

## See RAILWAYS.

## Chancery.

## TRUST FUND.

See CHARITY. COSTS.

## TRUSTEE RELIEF ACT.

See COSTS.

## USURY.

See CREDITOR'S DEED.

## VESTING ORDER.

See TRUSTEES. TRUSTEE ACT.

## VENDORS AND PURCHASERS.

1. *Interest on Purchase-money.*] Real estate, including property in possession and in reversion, was put up for sale by auction in lots, under a condition that the vendors should confirm the Master's report of purchases on or before the 25th of December, 1849, and that on or before that day, each purchaser should pay his purchase-money into court, and be entitled to the rents of his lot from that day, and that if, from any cause whatever, the purchase-money should not be so paid, he should pay interest on it at 5l. per cent. from that day. A purchased a reversion in fee, being one of the lots. Through the default of the vendors, the Master's report was not confirmed until August, 1851. Motion that A should pay his purchase-money into court with interest from the 25th December, 1849:—

*Held*, that interest was payable from that day at 4l. per cent. *Wallis v. Sarel*, 138.

2. *Description—Specific Performance.*] Where copyhold premises had been let on lease in 1793, and rent had been paid and the possession gone up to the time of the sale, according to the terms of the lease, it is not such a misdescription as will induce the court to refuse to enforce an agreement, if the premises be described as subject to a lease containing the usual covenants, although the original lease had been lost, and there was no evidence to show who was now liable under the covenants. *Flint v. Woodin*, 278.

3. *Auction.*] There is nothing fraudulent in the mere fact of an owner of property acting as auctioneer at a sale. *Ib.*

4. *Puffer.*] A puffer who bids by degrees up to his limit, instead of making his utmost bid at once, is not acting in fraud of the *bonâ fide* bidders. *Ib.*

See EXECUTORS. FRAUD.

## VICARAGE.

See RAILWAYS.

## VOLUNTARY SETTLEMENT.

*Equitable Assignment—Notice to Trustees.*] A, being equitably entitled to a freehold estate, and also to certain stocks and shares in public companies standing in the names of the trustees of his uncle's will, which were to be transferred to him absolutely on his attaining the age of twenty-five years, before that time arrived executed a voluntary settlement, whereby he assigned all his interest to certain new trustees,

## Chancery.

of whom he constituted himself one, upon certain trusts, and gave notice of the deed to the trustees of the will. Some of the shares were transferred to the new trustees:—

*Held*, that notwithstanding the notice, the court would not enforce the voluntary settlement either as to the real or personal estate, except with respect to those shares which had been actually transferred. *Bridge v. Bridge*, 496.

## WILFUL DEFAULT.

See EXECUTORS.

## WILL.

1. *Execution of Power.*] By a marriage settlement, power was given to the wife, if the husband survived her, to dispose by will, immediately, of 3,000*l.*, part of certain funds; and after the husband's death, of the residue of the funds. Powers were also given to her to dispose by will of certain household furniture; and there was a covenant by the husband that she should have power to dispose by will of certain shares, of her jewels, and of her savings. She died in her husband's lifetime. By her will, expressed to be by virtue of the power and authority of the settlement, after reciting that she had power to dispose of 3,000*l.*, she gave certain legacies and annuities. She then disposed of her savings. She then disposed of the shares and of certain jewels, and then gave the household furniture. She then directed, appointed, gave, and bequeathed all the rest, residue, and remainder of her moneys, and other her personal estate, after payment of debts and funeral expenses, to certain persons:—*Held*, that the will operated as an execution of her power as to the residue of the funds. *Harvey v. Stracey*, 13.

2. *Absolute Gift Cut Down.*] A testator, after giving a life interest in all his property to his wife, directed that at the death of his wife all his property should be sold, and divided equally between his five children, (two sons and three daughters); and that his executors should, upon dividing the whole of his said property, immediately lay out the whole of the moneys that would belong to his three daughters, as their shares of the said property, in the consols, neither of his said daughters to have power to receive more than the dividends due upon their respective shares; "but in case of the marriage of all or either of his daughters, the child or children of either of them that should outlive their mother or mothers should have his, her, or their mothers' share; and in the case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares and share should be equally divided among the survivors of his aforesaid children or their children." The testator's widow died in 1838, and one of the daughters died in 1849, without having been married:—*Held*, that the period of division as to the daughters' shares was not the death of the tenant for life, but the deaths of the daughters; and that the gift over upon dying unmarried was not to be restricted to dying unmarried in the lifetime of the tenant for life. *Piper, ex parte*, 30.

3. *Absolute Bequest.*] A testator, by his will, bequeathed all his property of whatsoever description to his wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she would dispose of the same to and for the joint benefit of herself and his children:—

*Held*, that the widow of the testator was entitled to have the entire residuary property transferred and paid to her for her own use and benefit. *Webb v. Woods*, 63.

4. *Construction — Mortgage.*] A testator, a mortgagee in fee of real estate, gave and bequeathed to A, and B, all and singular his household furniture, goods, plate, linen, and utensils whatsoever, and all and every other his goods and chattels, stock in trade, moneys, debts and securities for money, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his debts and to sell his personal estate, and hold the money arising therefrom upon the trusts therein mentioned:—

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*Held*, that under these words, the legal estate in the mortgaged property passed to the trustees. *Walker's Estate*, *in re*, 130, and see *King's Estate*, 128.

5. *Construction — Residue.*] A testator, by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof, so long as she should continue his widow. A part of the personal estate of the testator, at his death, consisted of a debt of 12,000*l.* payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent., from the death, on the debt or such part as for the time being should remain unpaid:—

*Held*, that the tenant for life was entitled to 4*l.* per cent. on the debt or such part as should remain unpaid, and that the other 1*l.* per cent. ought to be invested for the benefit of the tenant for life and those entitled in remainder. *Meyer v. Simonson*, 133.

6. *Construction — Residuary Bequest.*] A testator gave to his wife all his stock in trade, working jewelry and implements of every description whatsoever, and all his book debts, ready cash, money in the funds, bills, bonds, notes, or other securities whatsoever, for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, moneys, debts, and assets, and also all his household furniture, to be equally divided among the children he then had, or might thereafter have. But in case his wife should not marry again, then the testator bequeathed to her all and every his personal estate and effects whatsoever for her life, and the same to be equally divided amongst such of his children as should be living at her decease, share and share alike:—

*Held*, that the first clause in the will was not intended to be a specific bequest, and the last a residuary bequest; but that both clauses were intended to deal with the whole property, and were applicable to different events: the first applying to the testator's widow marrying again, the latter to her dying without marrying again; and the latter event being the one which happened, the children living at her death became entitled, to the exclusion of the representatives of those who had died. *Wiggins v. Wiggins*, 150.

7. *Intention to Create a Trust.*] A testatrix, by her will, gave 2,000*l.* stock to two trustees, in trust, to pay the dividends to the plaintiff for her separate use; and after making her will, she expressed her intention of giving a further sum of 2,000*l.* to the plaintiff upon the same trusts. One trustee died during the life of the testatrix; the surviving trustee transferred two separate sums of 2,000*l.* stock, at two different times, into her own name, and gave the plaintiff a power of attorney to receive the dividends upon both sums. There was evidence to prove that the trustee knew of the desire of the testatrix to give the second sum of 2,000*l.* to the plaintiff, and that the trustee had expressed her intention of carrying that desire into effect. The trustee afterwards became of unsound mind:—

*Held*, that the second sum of 2,000*l.*, so transferred by the trustee, was sufficiently impressed with a trust in favor of the plaintiff. *Gray v. Gray*, 154.

8. *Construction — Condition.*] A testator gave the residue of his estate to trustees, upon the usual trusts for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M. and N. during their minorities, or for apprenticing them, as his trustees should think proper; and declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the moneys unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M. and N. were both lunatic at the time of their attaining their majority:—

*Held*, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely. *Wright v. Wright*, 165.

9. *Construction — Absolute Gift.*] A testator gave to trustees a sum of money on the usual trusts for investment, and directed them to pay the income to A, for life, and, after his death, to divide the principal between the children of A, who should be living at the time of his (A.'s) death, and the issue of such as should be then dead, leaving issue, so that the issue of such child so dying should take the part which their deceased parent would have taken if living, to be paid to such children and issue, upon their attaining, and in case they should live to attain, twenty-one.



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A had a child, B, who died in his lifetime, leaving four children. Two of these children died in their infancy, in the lifetime of A:—  
*Held*, that the class to take was all the children left by B, and that the gift had vested absolutely in all those children. *Barker v. Barker*, 172.

10. *Separate Use.*] A testator, by his will, gave to A, a married woman, an annuity for her life for her separate use, and by a codicil, gave to A, in addition to the legacy mentioned in his will, the sum of 300*l.* No legacy had been given to A by the will:—

*Held*, that A was entitled to the 300*l.* for her separate use. *Warwick v. Hawkins*, 174.

11. *Revocation.*] Where real estate is contracted to be purchased, and the purchaser then makes a will devising all his real estate which he had contracted to buy, upon trusts for sale, and subsequently takes a conveyance to the ordinary uses to bar dower:—

*Held*, affirming the decree below, that the conveyance operates as a revocation of the devise of this estate. *Plowden v. Hyde*, 175.

12. *Reconveyance.*] Where an estate stood limited to the ordinary uses to bar dower, and the owner mortgaged it in fee, with a proviso for redemption, that on payment the estate should be conveyed to the mortgagee, his heirs, appointees, or assigns, or to such uses as he or they should direct, and he then made his will, devising all his real estate upon trust for sale, and afterwards the mortgagee reconveyed to the mortgagor the ordinary uses to bar dower:—

*Held*, reversing the decree below, that the re-conveyance was not a revocation of the will as to this estate. *Ib.*

13. *Gift of Dividends — Life-Interest.*] A testator gave the residue of his estate to trustees upon trust to pay the dividends of 1,500*l.* consols to A, for life, and, after his death, to divide the dividends of the said sum equally between his wife, E. B., and his niece, F. R., and the survivor of them. The testator gave all the residue of his estate to his wife, E. B., for life, with remainder to his niece, F. R., for life, with remainders over. F. R. died:—

*Held*, that E. B. was entitled only to a life-estate in the 1,500*l.* consols, and was not entitled to the principal. *Blann v. Bell*, 188.

14. *Enjoyment in Specie.*] A testator gave all the residue of his real and personal estate to trustees upon trust to pay certain specified legacies, and then, as to all the rest, residue, and remainder of his freehold, copyhold and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interests, rents, profits, and annual produce, to his wife for her life. The testator, at his death, was possessed of leaseholds, shares in companies, and Dutch bonds:—

*Held*, that the widow was entitled to the enjoyment of the leaseholds in specie, but not of the shares or Dutch bonds. *Ib.*

15. *Charge of Debts.*] A testator directed his debts to be paid, and then gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of all the rest, residue and remainder of his freehold, copyhold, and leasehold estates, and all other his estate and effects:—

*Held*, that the personal estate was the primary fund for the payment of the debts and legacies; and that the real estate was only charged with them as a subsidiary fund. *Ib.*

16. *Construction — Moneys — Consols.*] A testator, by his will, appointed A, and B, to be his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his death, to be by them placed in the funds, or otherwise laid out on security, the interest thereof to be paid to his wife for her life, and directed them, after her death, to divide the moneys held in trust by them between his two nieces. The testator had, at his death, only a small balance at his bankers, and the sum of 1,200*l.* consols:—

*Held*, that the consols were disposed of by the will under the terms of moneys. *Waite v. Combes*, 192.

17. *Execution of Power.*] A testator bequeathed certain property to A, for life, with remainder to such persons as A should, by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed and delivered in the presence of, and

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attested by two or more witnesses, appoint. A made a will, dated after the operation of the Wills Act:—

*Held*, that the will was an execution of the power. *Turner v. Turner*, 204.

18. *Consols.*] A, having a power of appointment over a sum of consols, some leasehold ground-rents, and some shares in an insurance company, made a will, by which she bequeathed all her real estate, money, and securities for money, to B, and all the rest, residue and remainder of her personal estate to C:—

*Held*, that all the property subject to the power passed by the will, and that B was entitled to the consols, and C, to the shares and ground-rents. *Ib.*

19. *Illegitimate Children.*] A testator recited in his will that he had nine children, whom he named and described, and he bequeathed the income of his estate to his wife for life; and, after her death, the capital to be divided among his children by his wife then living, and the issue of them who should be then dead. Various other trusts were declared by the will, and among them that the trustees should pay the interest during the life of such of his "said children" as should be a daughter in a particular manner. One of the daughters was illegitimate:—

*Held*, (Lord Cranworth laying great stress on the latter clause, but the lord chief justice considering the will sufficient without it,) that the intention of the testator was on the will manifest that the illegitimate daughter should take a share with the legitimate children. *Owen v. Bryant*, 217.

20. There is no inflexible general rule that illegitimate children cannot participate in a gift to children. *Ib.*

21. *Construction — Conversion.*] A testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust, to permit his wife during her life to receive the clear rents, issues, and profits, interest, dividends, and annual proceeds thereof, subject to all outgoing; and upon the death of his wife, then, as to all his said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely:—

*Held*, that certain leaseholds belonging to the testator were to be held by his widow in specie, no intention of conversion being expressed. *Harris v. Poyner*, 268.

22. *Repairs.*] Shortly after the testator's death his widow was called upon to make good the dilapidations to the leaseholds, under a covenant in the lease:—

*Held*, that these expenses, which the widow had paid out of her income, were properly chargeable upon the corpus of the estate. *Ib.*

23. *Construction — Legacy upon Condition.*] By deed certain real estates were settled to the separate use of M., a married woman, for life, without power of anticipation; remainder to her son W. for life; remainder to his first and other sons in tail male; remainder to the second and other sons of M. in tail male, with divers remainders over; provided that the trustees therein mentioned might, during the life of M., fell timber on the estate, and should invest the proceeds of the sale thereof, and pay the income thereof, during M.'s life, to the person entitled to the rents of the estate; and after her decease, should pay the principal among all M.'s children, except an eldest or only son, entitled to the estate in tail, or in tail male, under the preceding limitations, as M. should appoint, and in default equally. The plaintiff afterwards became a trustee of the settlement, and he and his co-trustee, J. L., cut down timber, which produced 1,500*l.*, of which 1,000*l.* was paid, at M.'s request, and on a promise by J. L. to indemnify the plaintiff, to M.'s husband to make certain repairs on the estate, and the remaining 500*l.* was invested in consols. M.'s husband, shortly after the payment of the 1,000*l.*, invested 500*l.*, part thereof, in consols, in the names of the trustees; but J. L. was never aware of that fact. J. L. died in 1847, having by his will, which recited the above facts, except the last-mentioned investment of 500*l.* directed his executors, in order to indemnify his co-trustee, and both their representatives, at the end of twelve months after his death, to pay the sum of 1,000*l.* clear of legacy duty, unto such person or persons as would be then legally or beneficially entitled to the moneys arising from the sale of the timber, provided that such person or persons should accept the same in discharge of any claim which they might have in respect of the said sum of 1,000*l.*, and should execute an effectual release. M. had four children, one of whom was a married woman:—

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*Held*, that the persons beneficially interested in the timber money were entitled to the whole legacy, if they accepted it as in the will mentioned, notwithstanding that the testator had made the bequest in ignorance of the fact that the trustees were only liable for 500*l.* instead of 1,000*l.*, and notwithstanding that by reason of the coverture of two of the *cestuis que trust* a proper release could not be given. *Stewart v. Frankland*, 298.

24. *Execution of Power.*] By a marriage settlement, reciting that the rents, issues, and profits of the property to be thereby settled should be to the separate use of the intended wife for life, and after her decease, for the further purpose of making of the reversion and principal thereof a provision for the children of her former marriage, certain real and personal property then belonging to the intended wife was conveyed to trustees, in trust to pay the income to the intended wife for life; and after her decease, in trust for such persons and in such manner as she, "in and by her last will and testament, or instrument testamentary, or in the nature of a will, in writing, to be signed and published by her in the presence of three or more credible witnesses, upon testamentary considerations only, during her intended coverture should direct or appoint:"—

*Held*, that the words "during her intended coverture" applied to the whole clause, and that an appointment made by the wife after the death of the husband was an invalid execution of the power. *Holliday v. Overton*, 302.

25. *Construction — Servant.*] Sir F. B., by his will, directed his executors to pay to each of his domestic servants who should be with him or in his service at the time of his decease such sum of money as should be equivalent to two years of the then annual amount of their respective wages. A. was the gardener of Sir F. B., at a mansion where Sir F. B., formerly resided, but which for a short time previously to and at the time of the decease of Sir F. B. was let by Sir F. B. to Lady M. for a short time. A., however, had never ceased to be the servant of Sir F. B., but had the charge and management of the gardens at the mansion, for which he received an annual sum from Sir F. B., in addition to his yearly wages. A. was not resident in the mansion, but resided in a cottage in the garden, in the same manner as he did when the mansion was inhabited by Sir F. B.:—

*Held*, following *Ogle v. Morgan*, 16 Jur. 277; s. c. 10 Eng. Rep. 92, that A. was not entitled to a legacy as coming within the description of "a domestic servant of the testator living with him or in his service at the time of his death." *Vaughan v. Booth*, 351.

26. *Delegation of Trust.*] A testator gave and devised the residue of his real and personal estate to A, B, and C, their heirs, executors, and administrators, upon certain trusts, and empowered his said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell. The surviving trustee devised the trust estate, and his devisees contracted to sell it:—

*Held*, that there was so much doubt about their having the power to sell, that the court would not compel the purchaser to perform the contract. *Wilson v. Bennett*, 431.

27. *Construction — Election.*] The testator, domiciled in England, and having real and personal estate in England, and real estate in Scotland, by will, executed and attested in the English form, by virtue of every right, power, or authority enabling him in that behalf, devised and bequeathed all his real and personal estate, whatsoever and wheresoever, upon trusts for the benefit of all his children. The will was inoperative, according to the Scotch law, to pass real estate in Scotland:—

*Held*, that the eldest son and heir, according to the law of Scotland, of the testator, was not bound to elect between the real estate in Scotland and the benefits given to him by the will. *Maxwell v. Maxwell*, 440.

28. *Survivor.*] Bequest to one for life, and then to be divided among four legatees equally, as tenants in common; if either died in the life of the tenant for life, his share to be divided among his children; if either died during that period without leaving issue, then his share to go to the survivors or survivor of them. One died leaving nine children, and then another died without issue, and then the tenant for life died:—

*Held*, that the children of the legatee who died first took no interest in the share of the one who died afterwards without issue. *Moate v. Moate*, 475.

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29. *Construction—Execution of Power.*] A testator being (under a deed of 1841) tenant for life of an estate A, with an ultimate reversion in fee in the same estate; and being tenant for life of estate B, with a power of revocation and new appointment, together with the ultimate reversion in that estate; by his will, referring to the deed of 1841, but not alluding to his power, confirmed that deed, and the trusts and provisions thereby declared; and reciting that he was seised and possessed of considerable freehold estates, and might become possessed of more, devised all his real estates of which he might die possessed, to certain persons, upon trusts, which were inconsistent with the trusts declared of estate B, by the deed of 1841. The testator was not, at the date of his will or of his death, possessed of any other estates besides estates A and B:—

*Held*, upon the construction of the whole will, that it operated as an execution of the testator's power over estate B. *Lake v. Currie*, 485.

30. *Wills Act.*] *Held*, also, that the Wills Act, 7 Will. 4, and 1 Vict. c. 26, has not, by making the will speak as from the date of the death of the testator, and thereby passing real estate of which he was not possessed at the date of the will, assimilated the doctrine as to the execution of powers over real estate to that of the execution of powers over personal estate. *Ib.*

31. *Settlement.*] A testator, who in his will refers to a settlement, must, in the absence of something to show the contrary, be taken to know the general effect of that settlement. *Ib.*

WINDING-UP ACTS.

1. *Contributory.*] R. had agreed to become a provisional committee-man, and, in answer to a notification that he might have 100 shares, had applied for 100 shares. The managing committee had resolved that each provisional committee-man must take twenty-five shares. The managing committee afterwards resolved not to proceed with the company, and applied to R. for 105*l.*, treating it as a call of 4*l.* 4*s.* on each of twenty-five shares, and stating, that on payment of 105*l.* R. should be protected from the creditors. R. paid the 105*l.*:—

*Held*, that he was not a contributory. *Robert's Case*, 7.

2. *Costs of Appeal.*] Costs of appeal from the Master's decision paid out of the estate. *Ib.*

3. *Jurisdiction of Master.*] Directors of one railway company passed a resolution to lend money to the directors of another company on their personal responsibility, and the money was so lent, and some of the directors signed a guaranty for repayment. Under an order for winding up the company, the directors of which borrowed the money, a claim was carried in on behalf of the lending company, but it was disallowed; and, on appeal, it was held,—affirming the decision of the Master,—that where a company or association is ordered to be wound up, the Master has no jurisdiction under the order to take cognizance of a claim not alleged to be due from the company, but only from individual members of it, and that it made no difference that the money was applied for the purposes of the company. *Wryghte, ex parte*, 182.

4. *Proof of Claim.*] A joint-stock company overdraw its account with its bankers, and was subsequently ordered to be wound up. The amount of debt was disputed, and the public officer of the bank (also a company) carried in a claim before the Master, who refused to admit it as a claim until the debt was proved at law. The Master of the Rolls on appeal admitted the claim, and directed an action to be brought; but, upon appeal to this court, it was held, that although the order at the Rolls was correct in remitting the claim, it must be altered by giving the public officer of the bank liberty to bring such action against such person or persons as he should be advised. *East of England Banking Co., ex parte*, 194.

5. *Breach of Trust.*] A railway company was formed, and a large number of shares in it was allotted, and a considerable sum paid in respect of deposits on the shares. A managing committee of the company was appointed, and five of its members were appointed a finance committee, with power to draw checks. By the direction of the managing committee, large sums, part of the company's funds, were employed in purchasing shares in the market. The Master, to whom the winding up of the com-

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pany was referred, charged the members of the finance committee with these sums, on the ground that the managing committee was implicated in the breach of trust. The Master's order was overruled. *London & Birmingham, &c., Railway Co., in re*, 201.

6. *Calls — Policies of Insurance.*] A subscribed the deed of settlement of a joint-stock company, instituted for the purpose of granting assurances on ships, for 1,000 shares of 25*l.* each. By the deed of settlement it was declared that a deposit of 2*l.* 2*s.* should be paid on each share, and that a further call of 2*l.* 2*s.* might be made by the directors, but that no further call should be made without a previous resolution of the shareholders assembled at a general meeting. The company granted several policies. The company was afterwards made bankrupt, under the 7 & 8 Vict. c. 111, and debts were proved against it to the amount of 70,000*l.*, and upwards. It was afterwards ordered to be wound up under the Joint-stock Companies Winding-up Act. The Master placed A on the list of contributories, and made an order that he should pay 25,000*l.* Motion, that the order, as to the call, should be discharged was refused. *Talbot, ex parte*, 205.
7. *Calls.*] Seven persons were elected the managing committee of a company, and performed acts in that character. The scheme proved abortive. Actions were brought against one of the seven, and he obtained an order for winding up the company. Others of the seven had made a similar attempt, but were not in time to do so before the order was actually obtained. An official manager was appointed, and the order was prosecuted with the concurrence of all seven. Four of the seven appealed from the order for winding up, and also from an order for a call to pay the costs and expenses and the debt; but it was held, first, that, whether the order for winding up were rightly or wrongly made, the four could not move to discharge it; and secondly, that the order for the call was properly made on the seven members of the managing committee. *Woolmer, ex parte*, 236.
8. *Contributory — Executor.*] By a clause in a joint-stock company's deed it was declared that the executor of a deceased shareholder should not be entitled to receive future dividends, but that they should remain in suspense until some person should become a member of the company in respect of those shares. For several years after the death of a shareholder the company paid the dividends to A, the first of two executors named in their books as the executors of the shareholder, but none of the formalities necessary for making A, individually, a member, in respect of these shares, had been complied with:—  
*Held*, that the company were not to be considered as having accepted A as a member in respect of these shares, and that B, the other executor, was still liable to contribute as one of the personal representatives of the deceased shareholder. *Crosfield, ex parte*, 284.
9. *Power of Master.*] *Held*, also, that the 17th section of the Winding-up Amendment Act, 1849, (12 & 13 Vict. c. 108), is retrospective as well as prospective, and that the Master had power to review a decision which he had made prior to the passing of that act. *Ib.*
10. *Contributory — Contract.*] By the deed of settlement of a company it was provided that every person being a purchaser in respect of any shares of the capital of the company, and every person being an executor or administrator of any deceased proprietor, should, as to all duties, obligations, claims, and demands upon or against him in respect of shares so to be purchased by him, or which should become vested in him as such executor or administrator, be considered a proprietor in the company from the time of the shares being so purchased, or being so vested in him as aforesaid; and also, that whenever, by any means whatsoever, any shares in the capital of the said company should be duly and effectually transferred to a new proprietor, then, and in such case, and not before, the responsibilities of the previous owner, as a proprietor in the company in respect of such shares, should cease and determine, and such previous owner should be exonerated and discharged from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements of the partnership deed. By another clause a reserved surplus fund was created, for the purpose, amongst other things, of meeting any unforeseen emergencies,

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losses, or extraordinary demands on the company; and by another clause it was expressly declared that every transfer should carry with it the profits and share of capital, and surplus reserved fund, in respect of the transferred shares:—

*Held*, that under the terms of the deed, the transferee of shares was, in respect of the transferred shares, subject to all the liabilities of the company, as well those incurred before as after the date of the transfer; and a motion by the executor of a deceased shareholder to discharge or vary the order of the Master, who, under an order for winding up the company, had placed his name on the list of contributories, and had made a call upon him in respect of the shares held by his testator, on the ground that some of the debts and liabilities in respect of which the call had been made were incurred before the transfer of the shares to his testator, was refused. *Cape's Executor, ex parte*, 325.

11. *Creditor—Action.*] P., claiming to be a creditor of a railroad company, applied to the Master to be allowed to prove his debt in the winding-up. The Master refused. On motion, the Vice-Chancellor referred it back to the Master, with a declaration that the debt, if any, due to P., formed a debt due from the company. The Master thereupon directed P. to bring an action against the official manager, and that upon the trial of that action certain admissions should be read in evidence, and that it should be admitted that the debt, if any, due to P., was a debt due from the company. On motion by a shareholder in the company, the court refused to discharge this order of the Master, but added a direction, that in case P. obtained judgment in the action, he should not deal with it in any way without leave of the court. *Gay, ex parte*, 337.

12. *Contributory—Transfer of Shares.*] By the deed of partnership of a joint-stock banking company, the directors were ordered at every half-yearly meeting of the company to exhibit to the shareholders a balance-sheet containing a full, true, and explicit statement of the debts and credits of the company, and the assets thereof, and the profits and losses of the company, and all other matters and things requisite for fully manifesting the state of the affairs of the company; and every such balance-sheet should be binding and conclusive on all the shareholders, their executors, &c., unless some error should be discovered therein before the next half-yearly general meeting. By the clauses regulating the mode of transfer it was declared that the transferee should, from the date of the transfer, be released from all subsequent claims and obligations in respect of the shares, but that such release should not extend to release him "from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder." The directors for several years exhibited, at the half-yearly meetings, very erroneous balance-sheets, purporting to show that very large profits had been made; and they declared dividends, when, in fact, from the first, large losses had been sustained. A shareholder sold and transferred his shares with the consent of the directors, more than three years before the order for winding-up the company;—

*Held*, that the losses to which a transferee of shares would be liable, under the deed, must be taken to mean such as appeared upon the balance-sheet; and that, as no losses appeared upon them, it was not competent, by other means, to show the existence of such losses; and that the balance-sheet was binding upon all the shareholders. *Holme, ex parte*, 341.

13. *Semble*, that losses cannot be said to have been sustained at the time of the loan or advance, but only at the time when the loan or advance turns out to be irrecoverable. *Ib.*

14. *Quære*, whether there could be losses within the meaning of the deed, to which a transferee would be liable, so long as any of the capital remained uncalled up? *Ib.*

15. *Statute of Limitations.*] A claimant against a company, which had been ordered to be wound up, produced evidence to prove the debt before the Master within the time allowed for recovery of the debt by the Statute of Limitations. The matter stood over by adjournment for nine months, and then the claim was disallowed, on account of the non-appearance of the claimant. On application, the Master afterwards reheard, and disallowed the claim for want of evidence, and as being barred by the statute. Shortly afterwards the claimant got the Master again to review his decision, when he again disallowed it as barred by the statute. On motion, it was referred back

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- to the Master to review his decision, on the ground that, the debt not being barred when first claimed before the Master, it was impossible for him to say that it was afterwards barred. *Great Western Railway Co., in re*, 357.
16. *Discretion of Court.*] Where a company had ceased to carry on business, but the governing body were *bonâ fide* putting in execution their powers, under the deed of settlement, to wind up the affairs of the company, the court refused to make an order under the provisions of the Winding-up Acts, although a creditor of the company to a large amount was in a position to issue execution for his claim against the company, and if not successful by such means, then against the members individually. *The British Alkali Company*, 412.
17. *Agent — Contributory.*] An agent of a company, who had accepted shares on which he paid nothing, afterwards begged to relinquish his agency, and to be allowed to give up the shares. His resignation of the agency was accepted, but not of the shares, though he was told that he might nominate some other person to pay upon them. Nothing further having been done:—  
*Held*, that he was a contributory. *Burton, ex parte*, 435.
18. *Contributory.*] A consented to become a provisional committee-man on condition that he should not incur any liability. Afterwards he took shares in the company without repeating the stipulation:—  
*Held*, that by taking the shares he became liable as a contributory, under the authority of *Upfill's Case*. *Markwell, ex parte*, 456.
19. *Club — Associations.*] A club is not a company within the meaning of the Joint-stock Companies Winding-up Acts; and although it is an "association," yet:—  
*Held*, that it is not an "association" within the meaning of the 12 & 13 Vict. c. 108, that act pointing at "associations" established for profit. *St. James's Club, in re*, 589.
20. Ambiguous words occurring in an act of parliament ought not to be extended to institutions which are well known to exist, but are not named in the act. *Ib.*

See BANKRUPTCY.

## WITNESSES.

1. *Examination of, under 15 & 16 Vict. c. 86.*] When an examination *vivâ voce* of witnesses, who have already deposed by affidavit, is sought, under the 15 & 16 Vict. c. 86, s. 39, the test to try whether permission should be granted is to see whether, if the case had come on upon bill and answer, (a replication having been filed), the court would, under the old practice, have directed an issue. Unless an issue would have been directed, the examination will not be ordered under the new statutes. *Wilkinson v. Stringer*, 500.

*Privileged from criminating himself.*]

See DISCOVERY.

*Commission to Examine.*]

See COMMISSION.









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